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ABSTRACT

This document consists of 3 volumes (9 issues) of a serial devoted to law-related education (LRE) that offers background information on a wide range of legal issues as well as teaching strategies for LRE. Issues of the magazine focus on the law as it affects schools and young people. Seven of the nine issues are devoted entirely to a special theme. The seven themes are: (1) law in American history courses (v17 n2); (2) LRE and the global environment (v17 n3); (3) teachers' and students' civil rights (v18 n2); (4) the status of legal services to the poor (v18 n3); (5) legal issues and principles related to diversity in America (v19 n1); (6) violence associated with attending school (v19 n2);, and (7) federalism (v19 n3). The two remaining issues (v17 n1 and v18 n1) examine, in broad terms, the concept of justice. Many themes in constitutional law are featured. Some articles take a global perspective, evaluating law in various world cultures. Each issue proposes teaching methods that involve class discussions and collaborative learning, such as mock trials, simulated public and Congressional hearings, and other role playing exercises. Many of the lesson plans include student handouts. A cumulative index to the journal (v1-19 1977-1995) is contained v19 n3. (LH)

ED 393 740

UPDATE LAW-RELATED EDUCATION

American Bar Association Special Committee on Youth Education for Citizenship

Justice for

for Justice

SO 025 835

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Opening Statement

Just over a year ago, a decision by 12 men and women in a Los Angeles courtroom served to imprint on our collective national consciousness the realization that for many Americans, one of the basic threads that runs through our society has become dangerously frayed, if not already snapped. "No justice, no peace" was not simply a facile slogan but a reminder that equal administration of and equal access to justice is a fundamental value of a nation pledged to "liberty and justice for all."

That decision and the ensuing debate underscored what many observers view as a widespread lack of confidence in our ability to deliver on one of the four goals set forth in the Preamble to the Constitution—to "establish justice."

American Bar Association President J. Michael McWilliams frames the issue in a broader context. What we confront, he says, is "a crisis in our justice system—lack of equal access to it, inadequate representation within it, and unbalanced funding of it.... We face a "justice deficit" that is pervasive and growing throughout our nation."

This issue has a simple theme: "Justice for All, All for Justice." In it, we hope to provide some insight, suggest some alternatives and look at ways in which justice can be seen not as a hollow promise inked on 200-year-old parchment, backed by noble sentiment and half-hearted promises, but as a living reality crafted by commitment and vigilance.

In a few weeks, our spring issue will arrive in your mailbox. Focusing on "Law and United States History," it will be guest edited by Eric S. Mondschein and Gregory S. Wilsey of the New York State Bar's Law, Youth and Citizenship Program. As law-related education is inextricably linked with U.S. history, the issue will help define this connection and explore new ways to use it to best advantage in the classroom.

Looking farther into the future, this fall we'll look at the broad spectrum of issues that grow out of the relationship between law and the environment. Responding to an increased level of public concern about the environment, especially among young people, guest editor Mary Louise Williams is planning a collection of articles and activities that will frame the issues and make them relevant to students.

Finally, a reminder: Our job is to serve you, our readers, providing you with a useful and timely resource that helps advance education about the law and citizenship. We encourage your comments, suggestions and opinions. What should we do differently (or not at all)? What features do you like? What topics would you like us to cover? Your opinions are important to us; please feel free to share them. You'll find our address below the table of contents on the opposite page or call me at (312) 988-5727. We look forward to hearing from you.

Jack Wolowiec

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Winter 1993

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Update helps classroom teachers and law-related education program developers educate students about the law and legal issues. Points of view or opinions expressed in this document are those of the authors and do not necessarily represent the official position or policies of the American Bar Association, the Fund for Justice and Education or the Special Committee on Youth Education for Citizenship.

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Front cover illustration by Victor Savolainen.

Justice for **ALL** for Justice

Equal Justice 30 Years After *Gideon*

An Update Interview
With Earl Johnson, Jr.

With a career spanning four decades, Earl Johnson, Jr. is recognized as a leader in efforts to improve the delivery of legal services to the indigent. Currently a Justice of the California Court of Appeal, Second Appellate District, in Los Angeles, California, he was named the first deputy director of the national Legal Services Program of the Office of Economic Opportunity in 1965. He currently chairs the Consortium for the National Equal Justice Library as well as the Access to Justice subcommittee of the ABA's Consortium on Legal Services and the Public.

UPDATE: March 18, 1993 marked the 30th anniversary of the Supreme Court's decision in Gideon v. Wainwright. *In the ensuing three decades, what progress has been made in advancing the goal of equal justice in this country?*

A considerable amount of progress has been made in terms of providing representation for criminal defendants, but we still have a considerable way to go before we fulfill the promise that every criminal defendant in every jurisdiction will be provided with adequate legal representation regardless of their means as a matter of constitutional right. In many places *Gideon* is observed in the breach rather than in actuality. By this I mean the all-too-frequent case in which counsel is provided but is so inadequately prepared and so overburdened that a meaningful defense is not possible. Many communities still lack public defender offices and suffer from an absence of programs which involve the private bar in representation of the indigent. Although we now spend about $1.7 billion providing legal counsel in criminal cases, there is an increasing unwillingness on the part of local governments to provide adequate funding in this area. There remain many problems but they would be much worse if *Gideon* had not happened. For example, at the time of the *Gideon* decision, it came to light that more than half of those in Florida prisons were convicted without the benefit of representation by a lawyer. There have been major strides made and this is not the case today. While we still have a ways to go, we have made real progress since *Gideon*.

UPDATE: How have attitudes about legal representation for the indigent changed over the years you have been involved in the movement?

In many respects, the public is more receptive to the idea of providing legal counsel to poor people, particularly in civil cases although there is no "civil *Gideon*." I think there is a very broad base of support for using tax funds to be used for the representation of the poor in civil cases. In the criminal area, however, there is more ambivalence, but in general I think there is broad acceptance among the general public for the notion that people should be provided with legal counsel at government expense if they can't afford it, in both criminal and civil cases.

One illustration, at least on the civil side, is provided by the recent history of the Legal Services Corporation. In the 1980s, the Reagan administration repeatedly attempted to kill the LSC by refusing to budget funds for it. Nevertheless, each year Congress did appropriate funds, an indication that there was a level of public support sufficient to prevail over the will of a popular president. Public opinion polls have consistently indicated that legal services are among the most popular programs provided by government. Another telling point is that the Supreme Court, which has cut back considerably on many of the rights of criminal defendants, has not done so with respect to *Gideon* and in fact has enforced that principle quite consistently, overturning convictions where it found that counsel was not provided. I think there is considerable public support—much more than there was 30 years ago. There is widespread sentiment among the public, whether based on reality or on propaganda, that criminal defendants have too many rights and are being treated with too much deference by the criminal justice system. However, I don't see a public perception that providing counsel to criminal defendants is part of the problem. I think the public recognizes that unless these

Illustration by Holly Pribble

defendants are represented the system just will not work.

UPDATE: In his 1919 book "Justice and the Poor" legal aid pioneer Reginald Heber Smith wrote: "Differences in the ability of classes to use the machinery of the law, if permitted to remain, lead inevitably to disparity between the rights of classes...And when the law recognizes and enforces a distinction between classes, revolution ensues or democracy is at an end." Today, lack of access to the legal system is not only a problem for the poor, but is being felt by the middle class as well. To what extent does class determine one's degree of access to the legal system?

Although poor people are better off with respect to their degree of access to the legal system than they were 30 years ago, we still have a situation on the civil side where only about 20% of those who have legal problems have representation. Our system of providing civil representation is vastly underfunded, especially when compared with other countries. The economic barrier to access to the courts remains very high for poor people, and we are seeing that it poses a substantial barrier to growing numbers of the middle class as well. In recent years, some steps have been taken to address this problem—prepaid legal services programs are one example—but the problem has not been fully addressed.

UPDATE: Since the inception of the legal aid movement, there has been debate about the role of government—particularly the federal government—in financing legal assistance programs for the indigent. Some contend that government funding of such programs is beyond the purview of governments and may act to promote particular political and social agendas. How do you respond to this criticism?

I can think of few areas where the government has a more clearly legitimate role. One of the primary functions of government is dispute resolution—providing peaceful ways for people to resolve disputes. Part of the social contract between govern-

About the National Equal Justice Library

An initiative of the American Bar Association, the National Legal Aid and Defender Association, and the American Association of Law Libraries, the National Equal Justice Library will be a working research facility, located at the Washington College of Law of The American University in Washington, D.C., containing the nation's only comprehensive repository of materials concerning the organization, financing and delivery of legal representation to the poor.

A wide range of individuals and organizations—from historians and social scientists to curriculum developers and classroom teachers—will be able to use the library's resources to develop public policy, promote training programs, and disseminate knowledge about issues of equal justice. The library will make extensive use of state-of-the-art information technology to make a variety of primary source materials, including videotaped oral histories, news broadcasts, books, articles, private papers, studies, memorabilia and related materials, accessible to all with an interest in issues of equal justice.

The library, which is scheduled to open in early 1995, has three purposes—to preserve the past, to inform the present, and to improve the future. As a catalyst to advance education about issues of equal justice from the elementary grades through college level courses, the library will serve not only as a reminder of past achievements but also as a foundation for continuing efforts to make our nation's goal of equal justice for all a reality.

ment and the people is that the sovereign authority must provide an equal chance for any citizen—regardless of their economic means—to prevail in a dispute. If the system that government establishes to resolve disputes includes forums that require lawyers, then the government has a duty to provide lawyers for those who cannot afford them. When government refuses to do so, it violates this contract. It is also a matter of due process and equal protection, as the average citizen would understand those terms. I think that the case for government involvement in supplying representation for the poor is much stronger than for providing, for example, medical care or social security. We should keep in mind that one of the four goals set forth in the Preamble to the Constitution is to "establish justice." Certainly in this sense the issue of equal representation is at the core of what our system of government is about.

As to the question of a "social agenda" being advanced, lawyers, whether they represent poor people and are being paid to do so by the government or whether they represent more affluent people who can afford their services, represent the interests of their clients and are providing representation that is in the best interest of their clients. They are not advocating any social agenda—they are simply doing what is best for their client.

UPDATE: In the course of debate over issues of national policy, such as health care, for example, there is a tendency to look abroad for possible models. How is the delivery of legal services to the poor handled in other countries? Are there any programs we might want to emulate?

Yes, there are. Most of the European democracies have by statute, or, in some instances, by constitutional interpretation, a right to counsel in civil cases. This statutory right to counsel is a common feature in most European countries as well as in some Canadian provinces. With respect to the method of delivering legal services, I think our system is perhaps the best, or at least, among the best. What we lack is a means of delivering these services in the quantity that is necessary to meet the demand, and here again funding is a large part of the problem. The situation is much different in many European countries and in some of the Canadian provinces where spending for legal representation of the poor is, on a per capita basis, anywhere from three to eight times greater than in the U.S. Again, this level of spending is due in part to the fact that such representation is recognized as a right.

While I think that on the whole our system is very efficient, there are two models that we might want to look at, those in Quebec and in Sweden. Both use a mixed system, combining representation by paid government lawyers with that of lawyers in private practice who are then reimbursed by the government. While in the U.S. most representation of the poor is furnished by paid staff lawyers, in many European nations—England, France, and Germany are three that come to mind—the bulk of such representation comes from private lawyers who bill the government rather than their clients for services rendered. The advantage of this type of arrangement is that it provides individuals with a choice of who they wish to have represent them. While we do not have this degree of choice in the U.S., our cost, on a per case basis, is substantially less.

Experience with the mixed approach has been positive, with a little over half of the clients selecting staff counsel with the balance choosing a private attorney. The choice seems tied to the type of issue involved. People who have problems with government agencies such as welfare departments, or those involved in landlord-tenant disputes tend to take those matters to the salaried staff attorney whereas individuals with problems of a more personal nature, such as domestic relations, are more likely to seek out a private attorney. The perceived expertise of the staff attorneys in some areas that we might characterize as classic poverty law probably plays a role in the choices people make.

Another feature worth pointing out in the Swedish system, and, to a lesser extent, the English, is that the program extends to the middle class by providing a partial subsidy to individuals on a progressive or sliding scale basis based on income. When the Swedish program started, it provided at least a partial subsidy for roughly 80% of the population. This again is something we might look at in terms of improving access of the middle class to the legal system.

While we are on the subject of how legal services are delivered in other countries, it might be of interest to look at the former Soviet Union. Lawyers belonged to a collective, much as would farmers or factory workers, and the collective received money from clients who could pay. That money would then be shared by the members of the collective. Those who couldn't pay were also provided representation, as the income from clients who could pay was supposed to offset the cost of representing those who couldn't—at least in theory. In principle, then, the issue of whether someone could pay was irrelevant in that if one lawyer was representing a client who couldn't afford to pay, there was likely a lawyer down the hall representing someone who could, and that payment was then shared by all the lawyers in the collective. That was how the system was supposed to work. How well it worked in practice is obviously another issue.

UPDATE: Last year, the Consortium for the National Equal Justice Library announced plans to establish the National Equal Justice Library, a unique facility which will document the history of efforts to provide equal access to justice. The library will also serve as a catalyst for the development of LRE curricula highlighting the vital role of the civil legal aid and criminal indigent defense movements in promoting equal justice. How did the concept for such a library evolve and how will it aid law-related educators in promoting increased student understanding about equal justice?

The idea originated with a small group from the board of the National Legal Aid and Defender Association who saw a need to preserve the history of both the criminal indigent defense movement and the civil legal aid movement, and in particular, the private papers and other documents that are central to their histories. We were haunted by what had happened to the papers of Clara Shortridge Foltz, who was the first woman lawyer in California, but more importantly is considered to be "the mother of the public defender movement." She drafted the first public defender act, lobbied for it and got it passed, and then went to a number of other states to promote similar legislation. When she died, her heirs simply threw away her papers and so we lost an invaluable historical collection. We were concerned that the same thing might happen again, particularly with regard to those who have been involved with some of the landmark events of the past 30-odd years, such as *Gideon*, followed a host of other major developments, such as the creation of the Office of Economic Opportunity Legal Services Program on the civil side, as well as the Criminal Justice Act, which provided public defenders in the federal courts. Most of the other public defender programs and criminal defense programs for poor people around the country were also created at about the same time, in roughly a two to three year period. We were fearful that much of this important material might be lost as people either died, changed jobs or for whatever reason. This was really the initial rationale, and as we gave the matter more thought we realized that there was really a much broader need, that is, to create a library that would have not only these invaluable private papers but everything else that has been written about efforts to bring about equal justice for poor people, including articles, Congressional hearings, studies, and so forth.

We also recognized the need to provide a resource for those who are trying to build a better future, whether it be a bar association committee looking for ways to design a program for their communities or possibly people from other nations, such as the emerging nations of Eastern Europe, who are looking for ways to foster justice. Another major goal is to make the general public more aware of what has been happening in this area of the law, to take this knowledge and history beyond the legal profession and the judiciary. We asked "How can we let the general public know about what has been done and what still remains to be done to realize the goal as set forth in the Constitution to establish justice and provide due process for all citizens?" The library is our effort to help answer this question.

UPDATE: Taking a long view of the struggle for justice in this country, and weighing the challenges we face in an increasingly diverse (and often increasingly intolerant) society, how do you see efforts to advance equal justice for all evolving in 21st century America?

In one sense, increasing diversity makes it more important to make the central organs of government accessible to all people on an equal basis. This is especially true with regard to the courts, where people meet, confront each other and resolve their disputes. If we fail to provide this accessibility, confidence in government will be lost along with allegiance to it, and what may well happen is that the very diversity that could so enrich our society will be the diversity that tears it apart. This increasing diversity in our society makes it all the more critical that we find ways to provide truly equal access to the justice system to all people, regardless of their economic standing.

The Right to Counsel: An Historical Overview

William G. Priest

As is demonstrated by the inclusion of the "right to counsel" within the Bill of Rights, this right is regarded as a fundamental liberty essential to a free society. Yet the Sixth Amendment, within which this right is contained, provoked little discussion or debate at the time of its passage. Subsequently, this right evolved gradually at the national level and was applied unevenly at the state level. Only during the last thirty years has this right to counsel been interpreted in a broad, consistent manner. This recent series of changes occurred because of several landmark United States Supreme Court decisions, for example, Gideon, Miranda, and others. Today, however, these decisions are being challenged and subjected to close scrutiny as pressures increase to make the criminal justice system more effective.

This lesson suggests several ways to introduce students to the meaning of the right to counsel. By exploring the historical development of this right, students should gain a greater understanding of the Sixth Amendment, the Bill of Rights as a whole, and the evolutionary nature of justice under our constitutional system. To accomplish these goals, several steps are outlined below. Some of the ideas contained may best apply to United States history classes, some to American government courses, and others to contemporary issues or law-related education curricula.

Procedure

Step One

To focus student thinking, ask where the right to representation by an attorney appears in the Bill of Rights. After allowing them to answer, instruct each student to examine the Bill of Rights to find the specific passage within the Sixth Amendment where this right is spelled out.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the assistance of counsel for his defence.* (emphasis added)

Ask students why this right was considered so important that it needed to be included in the Bill of Rights. (Asking students to write freely for five minutes on this topic might help focus their thoughts before beginning general classroom discussion.) A second question to further spark thinking, writing, and/or discussion, or to use as a follow-up to this free writing, would be: "Is it possible for a person to have a 'fair trial' and enjoy the due process of law guaranteed in the Fifth, Sixth, and Fourteenth Amendments without the assistance of an attorney?"

Discuss student responses to these questions. Be certain that they recognize that the Constitution says "in all criminal prosecutions" and originally applied only to cases in federal courts.

Step Two

To reconcile these two viewpoints, provide an historical overview of the evolution of the right to counsel from its original interpretation to its current construction. (In a United States history class, this may well be an appropriate opportunity to begin a study of the evolutionary nature of the Constitution.)

During colonial times, defendants' right to counsel varied from place to place. In England those accused of minor offenses (e.g., libel, perjury, battery, etc.) were accorded the right to counsel while those accused of criminal offenses other than treason were not. During the early national period, only a few states—perhaps only New Jersey and Connecticut—accorded the full right to counsel even if the accused was unable to pay for it. At the national level, although James Madison secured the inclusion of this right within the Bill of Rights readily enough, the absence of detailed debate or discussion casts doubt on the true significance of the right to counsel at that time. Clearly, the right to counsel was often interpreted simply as the right to retain counsel if you could afford one—and then only in criminal cases. Over time, judges in federal courts seemingly liberalized this interpretation and provided for the appointment of counsel in the absence of the ability to pay. Then, in the 1942 decision in *Betts v. Brady,* the Supreme Court recognized "special circumstances" in some state-level criminal cases where the accused might suffer infringement of due process rights without "assistance of counsel," and therefore the right to counsel had to be extended to those defendants under the Fourteenth Amendment. Those special circumstances might include "illiteracy, ignorance, youth, or mental illness, the complexity of the charge against him or the conduct of the prosecutor or judge at the trial." However, not until 1963,

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William G. Priest teaches at Rock Bridge Senior High School in Columbia, MO.

when Clarence Earl Gideon petitioned the Supreme Court for review of his request for a writ of *habeas corpus* freeing him from his Florida prison cell, did a dramatic transformation in the constitutional interpretation of right to counsel take place.

The *Gideon v. Wainwright* case is the subject of an excellent book entitled *Gideon's Trumpet*, by Anthony Lewis, and a film of the same name. Either would be an excellent vehicle for introducing students to the workings of the Supreme Court, the evolutionary nature of our individual rights, and the intricacies of our legal system. The film is available on videocassette and can be viewed in approximately two hours. Two central questions to ask students after viewing the film or reading the book are:

1. Why did the Supreme Court decide to reverse existing precedent and extend the right of counsel to defendants in state-level trials without regard to "special circumstances"?
2. Was the right to counsel essential to ensure a fair trial and due process for Clarence Earl Gideon?

Step Three (optional)

This activity is particularly useful in a government or law-related education class and focuses on a current issue involving possible infringement of the right to counsel. Virtually every state employs some form of "implied consent" doctrine for prosecution of driving while intoxicated (DWI) offenses. Obtain the text of your state's law(s) regarding DWI or "abuse and lose," and provide copies to students. Point out the provisions regarding refusal to submit to a sobriety test, which is usually done by means of a breathalizer. States have generally adopted the theory that acceptance of a driver's license entails certain responsibilities to which every driver has automatically given his or her implied consent. Among these responsibilities is submitting to a sobriety test when requested by a law enforcement officer. In most instances a time lag or waiting period no longer occurs between the time a suspect is stopped and is requested to take the test. This is intended to prevent the decrease of the alcohol content in the bloodstream before the actual test. States have adopted this approach through practical necessity in an attempt to combat this escalating problem. However, this action has elicited numerous challenges to the doctrine of implied consent and the laws based thereon. Constitutional objections include violation of Fifth Amendment protection from self-incrimination (either through refusal to submit, thereby tacitly admitting guilt, or through having the results of the breathalizer obtained from your own body proving your own guilt) to deprivation of the right to consult counsel before making the decision to submit or refuse the test.

This is a classic instance of the general welfare rights of the community to be protected from drunk drivers conflicting with the rights of an individual driver. After familiarizing the class with these facts, divide the students into groups of three to five and challenge them to develop a workable solution to this constitutional dilemma. Each group must submit a solution that the entire group can accept, whether it reconciles both sets of rights or seeks to protect the rights of the individual over the group or vice versa.

After solutions have been developed by the groups, convene a mock session of the state legislature to discuss each proposed "bill" to amend, replace, or uphold existing statutes pertaining to implied consent and corollary issues. If possible, invite a member of your state legislature to preside over your mock session and have him or her discuss the relative merits of the student proposals.

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Further Readings from Update

Update has dealt with laws about alcohol and driving in several contexts. Here's a sampling:

"Drink, Drank, Drunk," James P. Manak. Vol. 10, No. 2, Spring 1986.

"Federal/State Relations: 55 mph Speed Limit," Margaret Fisher. Vol. 11, No. 3, Fall 1987.

"Wheels," Walter M. Perkins and Lisa Broido. Vol. 3, No. 3, Fall 1979.

"What's All the Controversy Over Drinking Ages?", Patricia McGuire. Vol. 4, No. 2, Spring, 1980.

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Justice for ALL for Justice

Kids Learn About Justice by Mediating the Disputes of Other Kids

Suzanne Miller

It's a deal! Burying the hatchet after a student mediation.

A student mediator program trains kids to become mediators and help other kids resolve disputes peacefully. The training takes 17 to 20 hours and lasts a lifetime. At our school, it turns gladiators into mediators, lowers the risk for at-risk students, and brings out latent leadership ability in others. It decreases fights, hostility, suspensions, and office referrals. Thanks to the program, fear and stress are being replaced by friendship and trust. It is cooperative education at its best.

Want more benefits? The program turns negative leaders into positive role models, teaches problem-solving and decision-making, and empowers students—often for the first time—to solve their own disputes. It also eliminates the need for adult intervention.

The mediators' self-esteem improves as they perform a valuable service for their classmates and their school. Their grades go up and they walk taller. As *disputants* go through the mediation process, their self-esteem also improves because they have been empowered to shape their own destinies. They must brainstorm their own solutions to the problems and sign agreements to live up to their promises. Because the solutions are their own, the overwhelming number of resolutions "hold" and disputants learn that in a mediation everybody wins and nobody loses.

Judge Dennis J. Flynn of Racine has written that "this is one of the most positive ideas to help youth that I have ever come across."

The program has produced these success stories:

- During her 6th grade year, Latonya was a frequent runaway, a street fighter who once brought a butcher knife to school, for which she was suspended. She had frequently been a disputant and had gone through several mediations when she expressed the desire to become a mediator. Her reason: "I've been in a lot of trouble myself and could help others." Latonya was trained as a mediator in 7th grade and not only was an excellent mediator, she'd actually drag fighters off the streets and into the school to be mediated.
- Laurie completed mediator training but somehow never felt comfortable in the mediator role. Instead, she wrote P.A. announcements publicizing the mediator program and took care of scheduling mediations and routing pass slips to the mediators and disputants so they could all meet during study center for the mediation. When Laurie moved into another middle school's attendance area and found that her new school had no mediation program, she cam-

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Suzanne Miller is Assistant Principal of Gifford Elementary School in Racine, Wisconsin, and an instructor at the Graduate School of Carthage College in Kenosha, Wisconsin.

paigned until that school started a program.

- LaMont was a big, quiet, shy boy of color who conducted the first middle school mediation in the United States and became a highly successful and popular mediator. LaMont's grades improved after he became a mediator. He developed a great deal of poise and confidence and became involved in many other school activities. LaMont informally mediated disputes in the halls of the school and in the streets where he lived. He became the person to call when there was trouble in the neighborhood. When he graduates from high school, LaMont wants to become a lawyer.
- Sonya "fell through the cracks" before she became a mediator. She was a foster child who had lived in many homes and whose grades hovered between D's and F's. After she became a mediator, her sense of self-worth grew until Sonya became an honor roll student. Unfortunately, Sonya became pregnant before she could graduate from school. But once a mediator always a mediator. When Sonya was in the hospital to deliver her baby, she mediated a dispute between a couple having a serious disagreement.
- Rachel had a stepfather who frequently kicked her out of the house at the climax of heated arguments. After she became a mediator, she handled herself and her stepfather so differently that she was never kicked out of the house again.

While not all the success stories are as dramatic, mediators will clearly never quite be the same again. And while warring students may not become angels, they will always know that there is a way to solve their problems peacefully. At a time when human survival depends on finding alternatives to violence for resolving differences, there is no more compelling mission for educators.

For Law Day or Any Day

Law Day is one of the best times of the year to attract outside experts to the classroom, but the suggestions listed here apply to any time in the school year. Schools can use community people to explore the general benefits of mediation and other forms of alternative dispute resolution at many junctures of the curriculum. And they can harness these same experts to help them think about programs of school-based mediation on Law Day or any day.

Here are some sources through which teachers can find mediation experts in their community:

1. Mediation Centers. Also called "dispute resolution centers," "neighborhood justice centers," and other names, these centers are often listed under "Mediation Services" or "Arbitration Services" in the yellow pages. All of them have professionals well versed in the theory and practice of peaceful resolution of disputes; some have specific experience with school-based programs.

2. Bar Associations. Every state has a bar association, usually located in the state capital; local bar associations are usually in the county seat—because that's where the courthouse is. Many associations have committees on alternative dispute resolution, and could provide speakers and other resources.

3. The Courts. Many judges are familiar with mediation and arbitration programs because these programs are often used to relieve court congestion and speed the settlement of disputes. Call the clerk of your local court for more information.

4. LRE Programs. Many state and local law-related education programs around the country have curricula and resources on mediation and arbitration. If you don't know of a program in your area, The ABA's National LRE Clearinghouse might be able to help. Contact them at 541 N. Fairbanks Court, 15th Floor, Chicago, IL 60611-3314; telephone (312) 988-6386.

And, of course, many schools have already embarked on school-based mediation programs. Write NAME, UMASS, Amherst, MA, 01003 (telephone (413) 545-2462) for a complete list.

Conflict Resolution in United States Schools

In the 1960's and 1970's, religious and peace activists began to understand the importance of teaching conflict-resolution skills to young children. At about the same time, teachers began incorporating dispute-resolution lessons into their curricula, but their efforts were unorganized and isolated. In 1981, Educators for Social Responsibility (ESR) organized these independent activities into a national association. Their central question—"How can students learn alternative ways of dealing with conflict?"—was precisely the question peace educators had addressed for years.

While educators were developing conflict-resolution curricula, neighborhood justice centers were sprouting all over the United States. In order to establish a more responsive and accessible justice system, these centers offered mediation services for interpersonal and community disputes. Volunteer mediators were

Resources

National Association of Mediation in Education. UMASS, Amherst, MA, 01003; telephone (413) 545-2462. Major umbrella organization for school programs, has lists of programs, many helpful publications.

Conflict Resolution Resources for Schools and Youth, Community Board Program, Inc., 149 Ninth Street, San Francisco, CA 94103; telephone (415) 552-1250. One of the first school-based mediation programs, has curricula that would be useful for other schools.

Street Law Mediation, Cleveland-Marshall College of Law, Cleveland State University, 1801 Euclid Avenue, Cleveland, OH 44115; telephone (216) 687-2352. Another local program with very useful curricula.

American Bar Association, Standing Committee on Dispute Resolution, 1800 M Street, NW, Washington, DC 20036; telephone (202) 331-2258. An excellent source of information about all kinds of programs around the country, including those based in schools; has many publications, including packet of information for schools, directory of programs.

Society for Professionals in Dispute Resolution (SPIDR), 815 15th St., NW, STE 530, Washington, DC 20005; telephone (202) 783-7277. A source of information about mediation and arbitration around the country.

National Institute for Dispute Resolution, 1901 L St., NW, STE 600, Washington, DC; telephone (202) 466-4764. This research organization is a good source of information about a wide range of efforts.

trained in nonadversarial dispute-resolution skills, and they helped citizens resolve conflicts without using the courts. Both the volunteers and professionals quickly came to understand the importance of teaching youngsters conflict-resolution skills. And so community mediation programs began urging local elementary and secondary schools to initiate student conflict-resolution programs.

In the summer of 1984, fifty United States educators and community mediators met for a four-day School Mediation Institute to discuss starting conflict-resolution programs in schools. Because the participants wanted to maintain a support network for themselves and others who would be starting programs, they decided to form the National Association for Mediation in Education (NAME).

NAME members are pioneers in an exciting field. They are transforming schools from places where conflicts are handled by traditional means—suspension, detention, expulsion—into places where anger and conflict are accepted as part of life. They are teaching students at all ages how to deal with anger constructively, how to communicate feelings and concerns without using violence and abusive language, how to think critically about alternative solutions, and how to agree to solutions in which all parties win.

Anatomy of a Success: Problem and Solution

In the Spring of 1985, Gilmore Middle School staff members received an invitation from Assistant Principal Suzanne Miller to meet and discuss improving the environment at Gilmore: ways to make it a safer, more pleasant place to be for Gilmore's 6th, 7th and 8th graders and their teachers.

Almost twenty staff members responded, brainstorming problems and possible solutions. They called their project "Project Safe."

Some simple suggestions were made and implemented. For instance, stairways were made one-way at passing times to cut down on jostling and pushing.

The Safe Group felt most often peace and harmony was disrupted by disputes between two students which they are unable to resolve. There was the "He Said/She Said Syndrome." That's where one student tells another, "He said that she said that you're going to kick his butt after school." Within a short time, several people are involved and upset—and two people are ready to fight based on the rumors spread by others.

Then there were other conflicts typical of the middle school age group—name-calling, bumping into people and causing a fight, two friends suddenly not getting along anymore.

All these problems are the result of people not knowing how to handle relationships which have gone amiss—not knowing how to manage conflicts.

Drawing on the experience of other cities such as San Francisco and New York, the Gilmore committee decided to learn conflict-resolution skills themselves and then train Gilmore students to be mediators. The ultimate goal would be to have many students, teachers, and parents trained in conflict resolution and mediation. Those who were trained would better be able to handle their own conflicts and to help others solve their conflicts before they exploded into fights. The whole atmosphere of the school could be improved.

The Steps

Step One was to ally the Gilmore Safe Group with staff from the Dispute Settlement Center of Racine County. Professional mediators from the Dispute Settlement Center held eight two-hour conflict-resolution training sessions for teachers in the fall of 1985.

Gilmore teachers then trained twenty-one students to be mediators. They examined the training manuals and plans from other places and then tailored the curriculum for Gilmore students.

Assemblies were held to explain to the entire student body that mediation was a process in which a third party helps resolve a dispute in a way that nobody loses—and everybody wins. During this assembly, students presented a skit that illustrated the successful resolution of a dispute.

Finally, students were encouraged to apply for the training sessions which were being offered after school. More than fifty students applied. Twenty-one were chosen, with an effort to make the mix reflect the racial make-up of the school—and to include students who had a history of being involved in conflicts as well as students who didn't. We took care not to overlook students with latent leadership abilities and fighters. We wanted to turn street fighters around.

Students were trained in five afternoon sessions and one all-day session. At the end of the last day of training, the twenty-one students were give special "mediator" T-shirts. They were ready to mediate the conflicts of other students.

It had been just a year since the Safe committee first met to brainstorm ways to improve Gilmore's environment and make it a safer and more pleasant place to be.

Ready for Business

The newly trained mediators made P.A. announcements advertising their services. Teachers were given forms and were encouraged to recommend feuding students for mediation.

Students were encouraged to request mediation for their own conflicts by filling out request forms available in the counseling office.

The morning of March 13, 1986, brought some business. LaMont Langford was called to mediate the first dispute, one between two boys who constantly bumped into each other while changing clothes at adjoining gym lockers. As part of the signed resolution agreement, the boys asked the gym teacher to separate their gym lockers. They agreed not to hassle each other, and shook hands on the agreement.

The word started getting around, and the mediation business picked up. The mediators had a really good feeling about themselves and what they were doing. The students who had their conflicts mediated liked settling their own problems with the help of other students rather than having a teacher or principal step in.

We found that the majority of students say they'd rather have a student mediator handle their disputes than a teacher, counselor, or principal because: "It's easier to talk to someone your own age," "Another student understands," "Other students have had similar problems," "Students don't 'bust' you!"

The Results

By March 15, 1988, two years after the program began, more than fifty student mediators had been trained, more than 500 mediations had taken place, and the effects of Gilmore's peacemaker program had been far-reaching. In the community, an elderly lady said, "Whenever we have trouble in the neighborhood, we call for one of your mediators." Other mediators are also called on in their homes, churches, and neighborhoods to help resolve conflicts.

At a public meeting in which conflict resolution was being discussed, one person said, "They must have one of those conflict resolution programs at Gilmore. I used to substitute there and stopped because there was so much arguing and fighting. I substituted there again this year and it is so different. Instead of fighting, kids are talking about contracts and mediation..."

Having what was probably the first middle school mediator program in the United States, and certainly the first student mediators of any age in Wisconsin, turned out to be like having a wonderful tiger by the tail.

The Gilmore program has continued, and extended to help train student mediators from other schools in the area. Mitchell Middle School joined the program, as did Mitchell Elementary School in the fall of 1988. This process has been repeated in several Racine elementary, middle and high schools. By the beginning of the 1992-93 school year, there was such a demand for training that it became more practical to train teachers, counselors and administrators who, in turn, would train their own students.

From the modest Gilmore start in March of 1986, programs have sprouted throughout Wisconsin, Minnesota and Illinois.

How to Do It

The preceding history of student mediation programs in the Racine area illustrates how one district did it. Not necessarily the best way, but a very common way.

Teachers in my college class, Conflict Resolution for Educators, frequently ask, "Can a program start with just one teacher?" The answer is "Yes, of course." Historically, most programs do start with one person and one small group of students. The idea is so successful that others become interested and the idea spreads.

There are many other models. One from Champaign/Urbana, Illinois, is easy and practical. It could be described as the many-to-many more in contrast to the Racine one-to-many model. This school district held a two-day workshop for teachers and administrators, staffed by mediators and educators trained in mediation. From this seminar came visits by Illinois educators to Racine to see student mediator programs in action before starting their own programs.

Whatever the model, wherever the program, we believe that a peacemaker program serves as a school-wide discipline program that empowers students to regulate their own behavior rather than being controlled and policed by adult authorities.

Whether a program starts with one

teacher in one school or, better, with district-wide commitment, the first ingredient is a spark of interest in starting a student mediator program. One person or a group of people can have that interest. But then what?

1. *Join NAME, the National Association for Mediation in Education* (see Resources box). Order publication list and membership directory.

2. *Contact a professional mediator.* NAME is a resource. Colleges often have courses in mediation. The local bar association is another resource.

3. *Publicize the concept of student mediation* in assemblies, newsletters, and over the school P.A. so interested students, teachers and parents can get involved.

4. *Form an advisory council* of teachers, counselors, administrators, parents and students to form policies and make decisions.

5. *Decide on adults to be trained and involved.*

6. *Engage a professional mediator to train teachers and staff.* This will take approximately twenty hours. Often credit can be arranged through a local college. NAME has a directory of mediators who will present training institutes around the country. Training can take place on weekends or on school days if substitute teachers can be provided.

7. *Purchase or write a curriculum for training students.*

8. *Advertise for student trainees* and have each fill out an application form which includes the following questions:

A. Why do you want to be a mediator?

B. How do you think student mediators will be helpful to this school?

C. When you disagree with someone, how do you usually resolve the dispute?

D. In what ways have you shown leadership?

Include a contract for students to sign agreeing to attend all training sessions and a paragraph asking for parent permission. It is also a good idea to devote a section for a teacher to recommend the student for mediator training.

9. *Select the trainees.* This is the most difficult part of the whole process because it's subjective and unscientific. Get the advisory committee involved in the selection process.

In a school of 1,000 a good number of mediators to train is twenty-one. (Numbers divisible by three make for good role-playing.) You might want six or twelve. Some schools have trained a whole room of students, knowing all will benefit from the training but not all will want to be active mediators.

Whom do you select? Select a group that reflects the racial and ethnic makeup of your school. Balance males with females and honor roll kids with average students and street-wise negative leaders. Often the biggest "troublemakers" turn out to be the most effective mediators. A good question to ask as you select trainees is, "Who will benefit the most from being a mediator?"

10. *Train the student mediators.* Set aside seventeen to twenty hours for mediator training. After school usually works better, with late or activity busses governing the length of each session. If your district has summer school, the ideal way to train students is to offer conflict resolution as a summer class.

Set a limit of absences students can have and still continue the training. Since twenty hours is not really enough time for training as it is, two absences should be the maximum number allowed.

Training should end with a longer session in which professional or trained adult mediators critique the trainees as they role play mediations.

At the end of training, mediators can be awarded certificates, arm bands, badges or T-shirts identifying them as mediators.

11. *Start the program.* Publicize the start of the program in the newspaper, in newsletters, in assemblies and over the P.A.

Distribute forms to teachers, parents, bus drivers and students which can be used to request or recommend a mediation. (The bulk of mediations are requested by the disputants themselves.)

Decide whether mediators will work solo or in teams of two. The team approach has worked out very well in many school districts.

Decide where and when mediators will be held and which adult will be nearby during mediations.

Create a duty roster, putting two or more mediators "on duty" each day during each mediation time, which can be recess, lunch, or during study centers or home room periods.

12. *Keep the program going.* On daily P.A. announcements, thank by name the mediators who conducted mediations that day, and remind the students that they can request mediations for their disputes.

Hold monthly meetings with the mediators to discuss problems, strengths, questions. Provide some in-service at each meeting. Remember a mediator is never "done."

Each year, train a few new mediators with "old" mediators assisting. Give frequent reports to staff, parents and community through press releases sent to bulletins and newspapers.

At award ceremonies, give mediators some sort of certificate or other form of recognition.

What It Costs

The Gilmore program started and operated for several years without any money. Later, a mediation program was written into the Gilmore and Mitchell budgets for approximately $300 because the program meets the needs of both at-risk students and the students who are gifted and talented in the area of leadership.

Urbana Junior High School in Illinois got local businesses to underwrite their brochures and other printed materials.

In some areas, programs are funded by the local bar association, service clubs, the county or city, the school district, foundation grants, or a combination of some of the above.

Business-school partnerships are growing throughout the country, and there is the possibility for a business partner to join the school in a joint venture: starting a student mediator program.

What It Means

Educators who are involved with student mediation programs feel they are the most beneficial programs they've ever been associated with: they have many positives and almost no negatives. These educators realize that the programs are teaching life skills which will serve all the students all their lives. They're aware that this is indeed law-related education; certainly life-related!

With all their variety, school-based conflict-resolution programs share a common goal: to show young people that they have many choices, besides passivity or aggression, for dealing with conflict and to give them the skills to make those choices real in their own lives.

The beauty is that the student mediators, even third and fourth grade mediators, will tell you without being taught and without prompting, that there can't be world peace until there's one-to-one peace right in their own school and neighborhood.

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Justice for **ALL** for Justice

"You Be the Judge" Teacher's Guide

This year's *Student Update* includes a student-written feature entitled "You Be the Judge." It covers four different fact situations and raises issues of the rights and responsibilities of teachers and students.

Here is a discussion of the issues raised by each case.

Case # 1: Dress Codes and Gang Violence

In general, schools have the right to restrict what students wear to prevent disruption and increase the safety of the school. At the same time, many schools have no dress code, and students in these schools have the right to dress as they please.

Courts have been split over whether this (and choice of hair style) is a *constitutional* right. The *Tinker* case (*Tinker* v. *Des Moines Independent School District*, 393 U. S. 503 (1969), established the right of students to wear armbands as a political protest, but dress regulations don't often have this obvious dimension of infringing on constitutionally protected speech. As to the constitutionally protected right of association, that too is strongest where it is most directly related to expressing ideas in the political sphere. Any school might have difficulty banning the Student Democrats or "Youth for Perot." But is membership in a gang worthy of the same degree of protection?

In a conflict between the school and a student, much would depend on the specific facts of the case. In this hypothetical, the school would seem to have a legitimate reason to be concerned about gang violence and the safety of its students. However, is the Raider jacket a sign of gang membership? Is the earring gang related? Is there evidence that the student in question is a gang member? Are there other ways to limit the impact of gangs on the school that don't interfere with rights that may be constitutionally protected?

If the student in question can't afford another jacket, he probably would have an uphill fight to convince a court that he was losing his undoubted right to a free public education. Courts in many states have held that schools can legitimately charge for textbooks and other school supplies, even though the state constitution provides for free public education.

Could the school bar a teacher from wearing a Raiders jacket and an earring? Probably. Like students, teachers have a right to express their ideas in school, including wearing armbands. But when it comes simply to dress codes for teachers that don't have a political dimension, courts have usually deferred to school authorities.

Case # 2: Locker Search

Generally school officials have the right to search students and their lockers without having to first secure a search warrant. The Supreme Court case of *New Jersey* v. *T. L. O.*, 105 S.Ct 733 (1985), held that searches are permissible "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating the law or the rules of the school" and the search is not more intrusive than necessary to find the specific thing the school officials are searching for. However, this rule applies to searches of particular students reasonably suspected of a crime. A random search, such as the one here, would seemingly be overbroad and violate the Fourth Amendment.

If the search were lawful—i.e., the student had consented to it, the school official had reasonable grounds for suspicion, etc.—and the search turned up something else incriminating, that evidence would probably be admissible. (In *T.L.O.*, the assistant principal originally searched the student's purse for cigarettes; he found them, and, continuing the search, also found marijuana.)

As for locker searches, generally courts give schools more latitude there—because they are school property and because searching them is less invasive of privacy than searching the student's person. Sometimes schools make it clear beforehand that lockers are subject to search. If there was a threat of a bomb, authorities would presumably have the right to search all lockers to find the dangerous device and disarm it. The justification here is public safety, not an attempt to discover the perpetrator of a crime.

There isn't much case law on teacher's Fourth Amendment rights vis-a-vis school searches. It is always safest to first secure a warrant, but a

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"Gangs and the Fourth Amendment," Simone A. Donahue. Vol. 15, No. 2, Spring/Summer 1991.

warrantless search of a locker might be approved if it could be shown that the teacher had no expectation of privacy there (i.e., the school made it clear in advance that teachers' lockers were subject to search, the teachers knew that school authorities also had keys, etc.)

Case #3: HIV and the Fourteenth Amendment

In this hypothetical, an HIV-positive student is asked not to take part in gym out of concern for the safety of other students. He is given the chance to become a gym aid and receive credit for the course. Are his rights violated?

This is a new and evolving area, and hard-and-fast answers aren't possible. In general, equal protection of the law doesn't mean that the law treats every single person exactly the same; it generally means that the distinctions drawn by the law (or, as here, by school authorities) be reasonable and rationally related to a public purpose. The solution proposed by the school has a better chance of passing constitutional muster because (1) there is a risk, however small, of transmitting a fatal infection if the student continues to play and (2) the student's education is not disadvantaged (he still gets credit for the course).

The same considerations might apply to any class in which students might cut themselves (cooking, shop). It would be far harder for the school to make the case for a social studies or English class.

As for the teacher, his chances of hanging on to his job are good. Courts are reluctant to interfere with someone's livelihood if a compromise can be found which preserves the job and minimizes the risk. Since there would be virtually no danger unless the teacher played contact sports with the kids, an easy compromise would simply keep him on the sidelines.

A very similar issue was decided by the U.S. Supreme Court in *School Board of Nassau County, Florida v. Arline*, 481 U.S. 1024 (1987). That case involved a school teacher who was fired from her job solely because of her susceptibility to tuberculosis. The Court held that the teacher infected with tuberculosis was a "handicapped individual" within the meaning of the Rehabilitation Act of 1973. That Act prohibits federally funded state programs from discriminating against handicapped individuals solely by reason of the handicap.

Case #4: Title IX Discrimination?

In this hypothetical it is clear that Amy's rights are being violated. The school is making a number of assumptions which put girls at a disadvantage: that boys have afterschool jobs and have to practice first, that girls teams aren't good, that the chance of the boys' team repeating as state champion is more important than the girls' practice schedule. Title IX prohibits just this sort of gender discrimination. It would seem possible to create a practice schedule that is fair to everyone, so the issue of "whose rights are more important" wouldn't have to be raised.

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Justice for **ALL** for Justice

First Amendment Cases Top Court Term

Charles F. Williams and Robert S. Peck

Law and justice, unfortunately, are not necessarily one and the same. And the promise of "justice for all" has been an elusive goal throughout American history.

Yet "Equal Justice Under Law" is proudly carved over the entrance to the Supreme Court, a constant reminder of the great promise of American institutions. Here is a sampling of the issues and arguments in some of the more important cases that the Supreme Court has already heard but not yet decided.

Although the Court will hear oral arguments in the last of its 1992-93 cases on April 26, it will still be issuing decisions in late June.

First Amendment

HATE CRIMES

Wisconsin v. Mitchell
(No. 92-515)
Argument Date: April 21, 1993

In this case, the Supreme Court squarely faces the constitutionality of imposing higher penalties for discriminatory criminal conduct. This is an issue left unanswered by its decisions last term in *R.A.V. v. St. Paul*, 112 S.Ct. 2538 (1992), the cross-burning case, and *Dawson v. Delaware*, 112 S.Ct. 1093 (1992), a case involving whether a defendant's hate-group membership was material to his capital sentence.

Nineteen-year-old Todd Mitchell was part of a group of black men and boys discussing a beating in the movie "Mississippi Burning," when he said, "Do you all feel hyped up to move on some white people?" Soon, a 14-year-old white boy walked by on the other side of the street. At Mitchell's urging, the group beat the boy severely, stealing his sneakers and causing extensive injuries, including possible brain damage.

Mitchell was charged with and convicted of theft and felony aggravated battery. His two-year sentence was increased to four years after the jury also found Mitchell liable under a penalty enhancement law that applies when the perpetrator "intentionally selects" the victim because of his "race, religion, color, disability, sexual orientation, national origin or ancestry." The Wisconsin Court of Appeals sustained the conviction and sentence, but the Wisconsin Supreme Court, by a 5-2 vote, held that the penalty enhancer unconstitutionally punished bad thoughts as the motivation behind the crime and chilled free speech. 485 N.W. 2d 807 (Wis. 1992).

The state now argues that the Wisconsin Supreme Court failed to recognize that the legislature has legitimate reasons for exacting more severe punishment for conduct that is both a crime and an act of discrimination. Among the compelling interests it asserts are deterring the increased incidence of hate crimes, discouraging retaliatory or copycat crimes, and responding to the additional emotional harm inflicted on the victim. These reasons, Wisconsin asserts, are unrelated to penalizing beliefs.

The state also contends the challenged law operates no differently than existing civil rights laws in focusing on discrimination. Moreover, as in all crimes, Wisconsin states, the underlying motives are relevant to proper sentencing and indicate the defendant's future dangerousness, particularly to members of the targeted class of victims. The United States filed a brief supporting the constitutional validity of the hate crimes statute.

Mitchell asserts that the state supreme court's finding that the statute punished the motive for acting, rather than the underlying act, is binding on the U.S. Supreme Court. Thus, he says that the law runs afoul of the First Amendment by punishing bigoted or disapproved thoughts and ideas. Mitchell also claims that none of the state's asserted compelling interests justify content or viewpoint-specificity and that the state's interests can be accomplished in content-neutral fashion, by redrafting the penalty enhancement law to punish intent to create terror within a definable community or intent to inflict serious emotional or psychological harm. He also adds that the law is not analogous to anti-discrimination laws because they are aimed at disparate treatment rather than bigoted attitudes.

Charles F. Williams is the editor of Preview of U.S. Supreme Court Cases *and Robert S. Peck is the legislative counsel to the ACLU. These previews are adapted with permission from the* ABA Journal. *They reflect the arguments of the litigants and not the views of the authors or their employers.*

How a Case Gets to the Court

Among its several responsibilities under Article III of the Constitution, the Supreme Court has appellate jurisdiction to review the judgments of state and federal appellate courts in federal cases. This category encompasses more than just suits involving federal statutes and treaties—it also covers the many cases filed each year that challenge *state* laws on the ground that they conflict with the Constitution or federal law. And the Court's appellate jurisdiction extends beyond federal cases to include "diversity cases" that typically involve disputes between a citizen of one state and a citizen of another state.

Finally, the Court may also exercise "original jurisdiction" to hear and try all cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party."

Obviously, no one court could possibly hear and decide all of these thousands of cases each year. Thus, parties seeking to bring their cases before the Supreme Court normally must file a petition for a "writ of certiorari" in which they seek to persuade the Court that their case is important enough to warrant the Justices' review. While as recently as 1980 the Court granted certiorari in more than 300 cases, in recent years it has agreed to hear fewer than 150, and in this term the number is only 115.

RELIGIOUS SPEECH

Lamb's Chapel v. Center Moriches Union Free School District

(No. 91-2024)

Argued Feb. 26, 1993

Lamb's Chapel, an evangelical Christian church, sought to make use of public school facilities in New York's Center Moriches Union Free School District for an evening film series that discussed family issues from a religious perspective.

Although the school district permitted its facilities to be used for many civic and community purposes, the church's request was denied because school officials said the films were church-related.

Lamb's Chapel filed suit in the U.S. District Court for the Eastern District of New York, which granted summary judgment to Center Moriches School District on grounds that the school facilities were a limited public forum that could exclude religious speech as a content-neutral restriction. 770 F. Supp. 91 (E.D.N.Y 1991).

The U.S. Court of Appeals for the Second Circuit affirmed, adding that state education law restricted the use of public school facilities to non-religious purposes and that this prohibition was valid as long as the school district did not selectively deny access to certain expressions within any category of speech eligible to use the forum. 959 F.2d 381 (2d Cir. 1992).

Before the Supreme Court, Lamb's Chapel asserts that government may not exclude expression by private parties simply because the speech articulates a religious perspective. Ceding this power to government would allow it to engage in unconstitutional content discrimination that cannot be justified by any compelling government interest.

Instead, Lamb's Chapel states, a principle of equal access for religious speakers should be followed. Having made its facilities available to a wide variety of social, civic and recreational activities by numerous and diverse groups, the school district cannot limit private religious speech when a sectarian group similarly wishes to use a school auditorium, the church claims.

Center Moriches School District rsponds that it is not engaged in content discrimination against religious speech because it has opened its facilities only for cultural and educational activities consistent with school-related business and the community's welfare. This category excludes usage for the promotion of any private expressions or purposes, of which religious expression is but one.

Because Lamb's Chapel stipulated that the proposed film series was religious in nature, its application fell outside the permissible uses of school facilities, asserts the school district.

Center Moriches claims precedent for establishing such a limited public forum, for which restrictions need only be reasonable and viewpoint neutral. The district says that the restrictions at issue in this case meet that test because they are equally applicable to a variety of private purposes.

Moreover, viewpoint neutrality is met by similarly denying access to anti-religious expression. Thus, the school district argues that there has been no denial of any alleged right of equal access.

ESTABLISHMENT CLAUSE

Larry Zobrest v. Catalina Foothills School District

(No. 92-94)

Argued Feb. 24, 1993

In October 1987, James Zobrest, then 14, was enrolled at the Salpointe Catholic High School in Tucson, Arizona. His profound deafness qualified him as a "handicapped person" within the meaning of the federal Education of the Handicapped Act, which was interpreted to require the Catalina Hills School District, within whose boundaries he lived, to make a publicly financed sign-language interpreter "available" to him. The school district agreed to provide James with an interpreter at public expense, but only at a non-parochial school.

His parents sought an injunction to compel the school district to provide James with interpreter services at his Catholic school, but the U.S. District Court for the District of Arizona granted the school district's motion for summary judgment on First Amendment Establishment Clause grounds.

The U.S. Court of Appeals for the Ninth Circuit affirmed, holding that permitting a government-funded interpreter to work in a Catholic school would have a primary effect of advancing religion by constituting public aid to a religious institution. The court added that such an action also would create, in the eyes of James' Catholic schoolmates, a "symbolic union" of church and state. 963 F.2d 1190 (9th Cir. 1992).

The Establishment Clause, the Zobrests now argue before the Court, requires that government action have a primary effect that neither advances nor inhibits religion.

Here, they argue, the primary effect of denying funding for an interpreter solely on the basis of a school's Catholic values, while allowing such funding at a public school, would be to inhibit James' religion.

In its brief opposing the Zobrests' petition for certiorari, the school district characterized Salpointe Catholic's twin goals of advancing religious values and providing a secular education as so intertwined that any publicly paid employee placed into that atmosphere would be facilitating the school's religious, as well as educational, mission.

Accordingly, says the school district, an interpreter should fare no better than the maps, charts, tape recorders and laboratory equipment that the Court has previously barred local governments from providing to parochial schools on the ground that these items potentially could be "subverted" to religious purposes.

SACRIFICE

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah

(No. 91-948)

Argued Nov. 4, 1992

In 1990, the Supreme Court ruled in *Employment Division v. Smith*, 494 U.S. 872, that although laws that discriminate against religion must be justified by a compelling state interest, no such justification is needed in the case of "neutral, generally applicable regulatory laws" that have the incidental effect of barring the exercise of religion. Now, in a case involving a ban on animal sacrifices in Hialeah, Fla., the Court has an opportunity to clarify this controversial First Amendment standard.

Some 50,000-60,000 members of the Church of the Lukumi Babalu Aye live in southern Florida, where they practice an ancient African religion that came to the Caribbean with slavery and then was brought to the United States with Cuban refugees. This religion, known in America by its Cuban names of "Santeria" or "Lukumi," requires animal sacrifices for birth, marriage and death rites, as well as for the cure of the sick and the initiation of new members and priests.

When Hialeah adopted four ordinances in 1987 to forbid animal sacrifices, the church brought an action for declaratory judgment, injunctive relief, and damages. The U.S. District Court for the Southern District of Florida (ruling before the Supreme Court's decision in *Smith*) found the ordinances justified by Hialeah's compelling interests in regulating the keeping, killing and disposal of animals, in minimizing hazards to public health, and in preventing cruelty to animals. 723 F.Supp. 1467 (1989). The Eleventh Circuit affirmed in an unreported opinion.

Before the Supreme Court, the church contends that it is only the killing of animals for religious purposes that is banned—Hialeah permits the killing of animals for virtually any other purpose, whether it be for food, sport, or convenience. Thus, according to the church, the law is not neutral toward religion and must be struck down unless justified by a compelling governmental interest. And here, the church argues, most of the city's proffered interests are speculative and unproven, and none are sufficiently important.

The city, on the other hand, argues that its ordinances are neutral and generally applicable because they ban animal sacrifice no matter whether practiced by individuals, religious groups, non-religious groups, or cults. Moreover, Hialeah contends, even if the ordinances are not neutral toward religion, the district court correctly identified the city's compelling interests in banning animal sacrifices.

OBSCENITY

Alexander v. United States

(No. 91-1526)

Argued Jan. 12, 1993

Ferris Alexander, owner of a chain of adult-oriented bookstores, video stores and theaters, was convicted in the U.S. District Court for the District of Minnesota on obscenity charges stemming from the confiscation of four magazines and three videotapes that were offered for sale at his business.

A sentence of six years imprisonment and an assessment of more than $200,000 in fines and costs were only the start of Alexander's punishment.

RICO (the Racketeer Influenced and Corrupt Organizations Act) is a federal law that can also result in convicted defendants forfeiting property. Applying the forfeiture provisions of the federal RICO statute, 18 U.S.C. 1963, the trial court ordered the seizure of Alexander's entire chain of stores and his full inventory, including books, magazines and videotapes that were not obscene.

The U.S. Court of Appeals for the Eighth Circuit affirmed the conviction and punishment. 923 F.2d 835 (1991).

Before the Supreme Court, Alexander argues that the forfeiture power being claimed by the federal government amounts to a license to employ whatever remedies it chooses against unprotected speech (the obscene materials), even if the effect is to impose a classic prior restraint on protected non-obscene speech.

Alexander submits that the lower courts should have focused on the non-obscene speech being restrained by the seizure of his entire inventory rather than on the seven items which gave rise to the remedy.

Finally, Alexander charges that the forfeiture of a $25 million business, and the imposition of $200,000 in fines and a six-year prison sentence is grossly disproportionate to the crime of distributing seven obscene items, thus violating the Eighth Amendment's prohibition against cruel and unusual punishment, and excessive fines.

The United States counters that no First Amendment principle bars the imposition of a forfeiture penalty when the underlying racketeering activity consists of multiple obscenity violations.

The government adds that there is no free-speech right to use obscenity profits to finance constitutionally protected speech or to withhold such protected materials from the seizure of personal property derived from a criminal enterprise. The government notes that the district court found that all of the forfeited property constituted racketeering proceeds.

The United States argues that the expressive material was not seized to suppress it but because it was an asset of a racketeering enterprise. The government points out that Alexander is free to engage in future expressive activities unsubsidized by past criminal conduct.

The government also urges that the Court find that the forfeiture is not a disproportionate punishment because Congress has deemed the offenses serious and because, even without RICO, Alexander could have been sentenced to 60 years in prison and fined $3 million.

COMMERCIAL SPEECH

Edenfield v. Fane

(Docket No. 91-1594)

Argued December 7, 1992

In this case, Scott Fane, a CPA who moved from New Jersey to Florida to set up his own practice, sought declaratory and injunctive relief from a Florida regulation banning CPAs from engaging in "direct, in-person, uninvited solicitation" of potential clients. The district court granted Fane's motion for summary judgment on First Amendment grounds, and the Eleventh Circuit affirmed. 945 F.2d 1514 (1991).

Before the Supreme Court, Florida invokes the Court's decision in *Ohralik v. Ohio State Bar Association*, 436 U.S.447 (1978), which upheld state rules barring attorneys from contacting prospective clients in person or by telephone. Florida argues that the *Ohralik* rationale supports the CPA regulation in this case: like the Ohio State Bar, the Florida Accountancy Board is responsible for regulating and licensing a "learned profession" for the good of the public as well as the profession, and, as in *Ohralik*, unsolicited oral sales pitches would be virtually impossible to regulate.

Fane, on other hand, argues that *Ohralik* is inapplicable. There is, he says, no evidence that CPAs would or could exercise undue influence over their potential clients in the manner of the ambulance-chasing attorney in *Ohralik*, and the very nature of a CPA's work guarantees that there will be a paper trail of any irregularities. Moreover, Fane says, whereas *Ohralik* contemplates that all of a state's lawyers will operate by the same solicitation rules, Florida's rule is "under inclusive" because it leaves non-CPA tax preparers, accountants and financial consultants free to solicit clients orally. Arguing that the state cannot demonstrate that its regulation is narrowly tailored to advance its interest in protecting the public or the integrity of CPAs, Fane concludes that its true purpose is to stifle competition.

Florida, however, sees no such violation of the test for commercial speech restrictions that was outlined in *Central Hudson v. Public Service Commission*, 447 U.S. 557 (1980), and it argues that the regulation can also be upheld as a reasonable time, place and manner regulation.

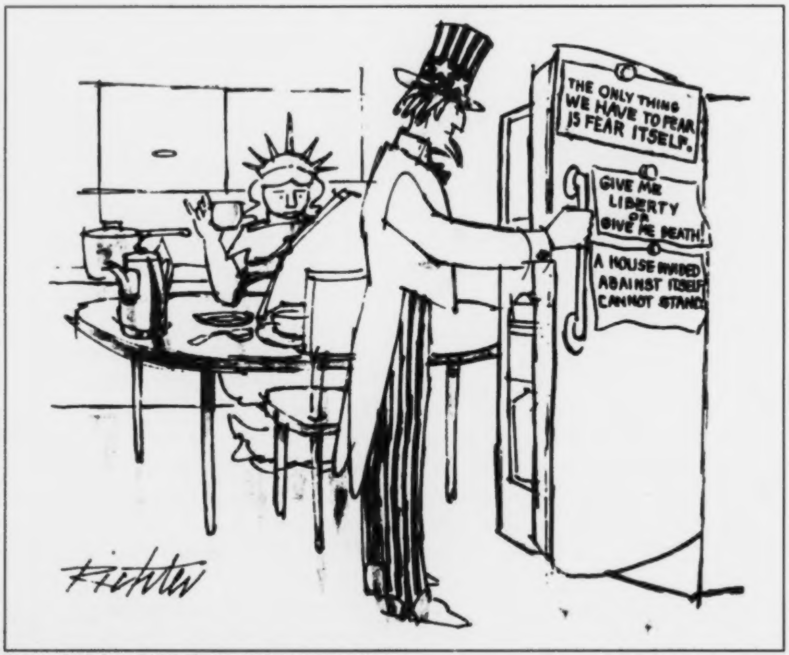
COMMERCIAL SPEECH

United States v. Edge Broadcasting

(No. 92-486)

Argument Date: April 21, 1983

Pursuant to 18 U.S.C. Sections 1304 and 1307, only stations located in lottery states may broadcast lottery


THE ONLY THING WE HAVE TO FEAR IS FEAR ITSELF.
GIVE ME LIBERTY OR GIVE ME DEATH!
A HOUSE DIVIDED AGAINST ITSELF CANNOT STAND
Richter

Drawing by Richter. ©1992 The New Yorker Magazine, Inc.

ads. Because North Carolina is not a lottery state, WMYK-FM, a North Carolina radio station located just over the border from Virginia, cannot carry ads for the Virginia lottery. Shortly after acquiring WMYK, Edge Broadcasting found that the station's inability to accept these ads put it at a competitive disadvantage with the numerous Virginia-based stations in its listening area. Naming the United States and the FCC as defendants, Edge sued to have the lottery statutes declared unconstitutional as applied to WMYK.

The district court ruled that prohibiting WMYK from carrying Virginia lottery ads did not directly advance the government's asserted interests as required by *Central Hudson Gas v. Public Service Comm'n.*, 447 U.S. 557 (1980).The Fourth Circuit affirmed in an unreported opinion. 732 F.Supp. 633 (E.D.N.C. 1990), *aff'd* 956 F.2d 263 (4th Cir.1992) (Table).

Before the Supreme Court, the United States relies upon *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986), for the proposition that advertising bans are valid so long as the ads promote an activity that the government could prohibit altogether. In any event, the government urges, sections 1304 and 1307 do directly advance Congress's substantial interest in discouraging citizens in non-lottery states from playing state lotteries while at the same time accommodating the desire of lottery states to promote their games. According to the government, the statutes directly advance these interests on a national level, and therefore it need not defend them on a case-by-case basis.

Edge Broadcasting responds that *Posadas* does not excuse the government from complying with the *Central Hudson* test and that, under *Central Hudson*, the fact that the statutes may advance congressional interests in many situations is no basis for applying them in a situation where they further no governmental objectives whatsoever. Here, Edge argues, although the government's only interest in preventing WMYK from broadcasting Virginia lottery information is to discourage North Carolinians from playing the game, 92 percent of WMYK's listeners live in Virginia, and the 8 percent who do live in North Carolina are already inundated by the lottery ads being broadcast by WMYK's Virginia-based competitors.

Equal Protection

CABLE TV

FCC v. Beach

(No. 92-603)

Argued March 29, 1993

The 1984 U.S. Cable Communications Policy Act required cable television systems to obtain franchises from local governments.

Exempted from the requirement were Satellite Master Antenna Television (SMATV) systems that serve commonly owned, controlled or managed buildings and that do not use a public right-of-way. While cable systems typically depend on wire interconnections, SMATV systems receive signals through building-mounted satellite antennae.

Several SMATV companies whose systems did not qualify for the exemption challenged it unsuccessfully before the Federal Communications Commission (FCC) on statutory and equal protection grounds. The companies contended that there was no basis to treat systems that use no public right-of-way differently because some of the systems serve commonly owned buildings, while others serve buildings that are separately owned.

The U.S. Court of Appeals for the District of Columbia Circuit found merit in the equal protection argument and remanded the case to the FCC for the development of a record to meet rational basis analysis.

When the FCC merely adopted rationales suggested by Judge Abner Mikva in a concurring opinion, the court, with Mikva dissenting, concluded that the justifications were without foundation and ruled that equal protection was violated when SMATV systems were treated differently on the basis of whether the buildings served were commonly owned. 965 F.2d 1103 (1992).

Before the Supreme Court, the FCC defends the franchise exemption for some SMATV systems by arguing that the adoption of Mikva's suggested rationales satisfies rational basis scrutiny.

The commission notes that numerous precedents have found a rational basis in plausible, but unverified, assumptions without evidentiary support in the record. Classifications based on such factors as common ownership, the FCC says, must be upheld if any facts reasonably may be conceived to support the classification.

Here, the FCC echoes Judge Mikva in suggesting that the "common ownership" requirement serves consumer interests by constraining system size and giving the small circle of consumers greater leverage over the product supplied.

Respondent-intervenor National Cable Television Association objects that upholding the appellate court decision would create new competitive inequities between traditional cable systems and SMATV systems that interconnect independently owned buildings because franchise requirements entail additional costs to the franchisee.

SMATV operators attacking the exemption argue that, when a system does not use a public right-of-way, there is no rational basis for imposing local franchising requirements on some systems but not on others. Historically, the operators state, the federal government has exercised exclusive authority over interstate media. Local regulation, such as franchising, has been permitted only when these media use public rights-of-way.

Moreover, the SMATV companies challenge the credibility of the FCC's proffered rational bases, stating that a distinction based on "common ownership" does not necessarily constrain system size, aid consumers or serve any other legitimate government interest.

Fourth Amendment

FEELINGS

Minnesota v. Dickerson
(No. 91-2019)
Argued March 3, 1993

Upon leaving an apartment building known for housing drug activity, Timothy Dickerson spotted Minneapolis police officer Vernon Rose's squad car. He abruptly turned and entered an alley, where Officer Rose followed and made an investigative stop. While frisking him "for weapons and contraband," Officer Rose felt a small, hard object, about the size of an aspirin and wrapped in plastic, in the pocket of Dickerson's thin nylon jacket. After manipulating the object with his fingers, the veteran officer concluded that it would prove to be crack cocaine. He pulled it out, confirmed his suspicion, and arrested Dickerson for possession of a controlled substance.

The Minnesota trial court denied Dickerson's Fourth Amendment motion to suppress, deferred entry of judgment of guilt, and placed him on probation. Dickerson appealed, and the Minnesota Court of Appeals ruled that the crack seizure was improper. 469 N.W.2d 462 (1992). The Minnesota Supreme Court affirmed, 481 N.W.2d 840 (1992). Six weeks later, the trial court vacated the deferred adjudication and dismissed the case. The U.S. Supreme Court accepted the state's petition for a writ of certiorari.

Minnesota now asks the Supreme Court to hold that a police officer may seize any contraband or other evidence he or she can identify by sense of touch during the course of a protective pat down. The state reasons that such a rule would be a natural extension of the stop-and-frisk rule of *Terry v. Ohio*, 392 U.S. 1 (1968), and a logical corollary to the plain-view doctrine. The state points out that *Terry* itself authorizes police to rely on their sense of touch when frisking a suspect for weapons, and argues that its proposed rule differs from the plain view doctrine only in that it involves the sense of touch rather than sight.

Dickerson responds that the writ of certiorari in this case should be dismissed as improvidently granted, but that in any event *Terry v. Ohio* does not permit police to remove and inspect items that do not feel like possible weapons. Urging the Court not to adopt a "plain feel" exception to the Fourth Amendment's warrant requirement, he argues that such an exception would encourage deliberate warrantless searches involving physical contact and invasions of personal privacy. Disputing the state's analogy to the plain-view doctrine, Dickerson argues that, whereas no Fourth Amendment "search" takes place when an officer merely observes an object exposed to public view, the Fourth Amendment is triggered by an officer's exploratory manipulation of an obvious non-weapon concealed in a person's pocket.

Eighth Amendment

SMOKY BARS

Helling v. McKinney
(No. 91-1958)
Argued Jan. 13, 1992

To prevail on an Eighth Amendment challenge to prison conditions under *Wilson v. Seiter*, 111 S.Ct. 2321 (1991), an inmate must do more than show that the alleged problem is so serious that he or she is entitled to constitutional protection; the inmate must also show that the prison officials have acted with "deliberate indifference." In the case now before the Supreme Court, Nevada prison officials are seeking to reverse the Ninth Circuit's decision that William McKinney, a Nevada inmate serving a life sentence for murder, has stated an Eighth Amendment claim based on his involuntary exposure to environmental tobacco smoke (ETS).

This marks the issue's second trip to the high court. On its first journey, a magistrate granted the state's motion for a directed verdict, the Ninth Circuit reversed the magistrate, and the Supreme Court reversed the Ninth Circuit, remanding the case for reconsideration in light of *Seiter*. On remand, the Ninth Circuit reasserted its opinion that alleging an unreasonable exposure to ETS is enough to satisfy the "objective component" of the cruel and unusual punishment clause. But it remanded the case to the district court for a determination of the "subjective component," i.e., whether Nevada prison officials had acted with deliberate indifference to McKinney's "long-term exposure to unreasonable levels of ETS." *Helling v. McKinney*, 959 F.2d 853 (9th Cir. 1992). The Supreme Court again granted certiorari.

Nevada now argues that in the absence of any evidence that McKinney is suffering from smoke-related health problems, his exposure to ETS cannot be said to violate the cruel and unusual punishment clause. Suggesting that Mckinney's ETS claim is but one in a series of manipulative complaints he has pursued over the years about the drinking water, the presence of saccharine in his food, butane heater fumes, and being forced to sleep in an upper bunk, Nevada asks the Court to avoid giving prisoners an invitation to sue over every potential health risk. The state also contends that establishing prison policies on matters such as smoking is a task for which the federal courts, far removed from the budgetary and security concerns facing state prison officials, are wholly unsuited.

McKinney responds, first, that the writ of certiorari should be dismissed in light of the Nevada prison system's recent adoption of a restrictive smoking policy. If the Court does reach the merits, he contends, it will find that a number of Eighth Amendment cases, including cases based on prisoners' exposure to asbestos, pesticides and infectious diseases, all establish that alleging a risk of serious injury from latent or potential hazards satisfies the objective component of the cruel and unusual punishment clause. He therefore asks the Court to affirm the Ninth Circuit's ruling that would remand the case to a magistrate for a determination of whether the prison officials in this case acted with deliberate indifference to the health risks posed by long-term exposure to secondary tobacco smoke.

Immigration Law

Refugees

McNary v. Haitian Centers Council, Inc.

(No. 92-344)

Argued March 2, 1993

After Jean-Bertrand Aristide was overthrown as president of Haiti in September 1991, an unprecedented flood of Haitian refugees attempted to make their way to the United States by sea.

After temporarily suspending a decade-old policy of interdicting their vessels and returning them to Haiti, U.S. President George Bush subsequently resumed repatriation of intercepted refugees as soon as post-coup violence subsided.

The Haitian Refugee Center brought a class-action suit based on an immigration statute that prevents repatriations when the lives or freedom of refugees are jeopardized by their political views.

In 1992, an injunction issued by the District Court for the Southern District of Florida against the repatriations was stayed by the Supreme Court. The 11th Circuit Court of Appeals subsequently reversed the remaining injunctions issued by the district court and ordered the case dismissed. 953 F.2d 1109.

The Haitian Centers Council then won a new class-action injunction in the Eastern District of New York after appeal, as well as a Second Circuit decision relating to a subsequent interdiction executive order. 969 F.2d 1326, 1350.

Before the Supreme Court, the federal government argues that the immigration law relied on by the lower courts applies only to aliens in the United States or at American borders and has no application to aliens interdicted beyond U.S. shores.

The government adds that it has been traditionally presumed that American laws do not apply outside our borders, so the Haitians do not have a right to relief from American courts. Moreover, the government asserts that the class of Haitian refugees, having lost similar prior claims in the 11th Circuit, cannot raise them anew.

Finally, the government contends that, since the president's interdiction orders required the use of military resources, they are entitled to the great deference normally given by the courts to presidential directives regarding military operations and foreign policy.

The Haitian Centers Council argues that immigration law protects aliens from being returned to their homelands when they fear political persecution, irrespective of where the refugees are seized by U.S. authorities. The right of protection attaches as soon as refugees clear the territorial borders of their home countries, according to the council.

The executive branch cannot assert plenary discretion in responding to the refugee situation, but instead must follow the clear mandate of the law, the council asserts.

The council also argues that this case is not precluded by the earlier dismissed case because it involves different parties who raise a pure question of law based on a change in the government's policy and conduct from the earlier case.

Evidence

EXPERT WITNESSES

Daubert v. Merrell Dow

(Docket No. 92-102)

Argued March 30, 1993

Petitioners Jason Daubert and Eric Schuller were born with permanent limb-reduction defects that they attribute to their mothers' use of Bendectin, an anti-nausea drug marketed by Merrell Dow from 1956-1983 and prescribed by physicians to combat the "morning sickness" that often accompanies the first trimester of pregnancy. After the petitioners' cases were removed from state court and consolidated for trial, both lower federal courts concluded that the causation evidence provided by petitioners' expert witnesses was inadmissible, and that Merrell Dow was therefore entitled to summary judgment. 727 F. Supp. 570 (1989); 951 F.2d 1128 (9th Cir. 1991).

Now at issue before the Supreme Court is the viability of the oft-cited rule, first announced 70 years ago in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), that the scientific techniques on which an expert bases his or her testimony must first be shown to be generally accepted as reliable by the relevant scientific community. This rule, the petitioners contend, has been supplanted by the Federal Rules of Evidence and therefore should not have been used by the lower courts to exclude their experts' testimony that Bendectin causes birth defects. When Congress enacted the Federal Rules in 1975, the petitioners urge, it intended to broaden the admissibility of evidence by relying on the adversarial process to expose unsound expert opinions.

Merrell Dow responds that the traditional requirement that expert testimony have an adequate foundation (as judged by the accepted standards in the expert's field) lives on in Federal Rule of Evidence 702, which permits expert witnesses to testify to scientific "knowledge," not to their personal views or theories. The company sees Rule 703, which permits an expert to rely upon facts or data not admissible in evidence if the data are "of a type reasonably relied upon by experts in the particular field" as reinforcing this interpretation.

The United States as amicus curiae interjects that although the Federal Rules' standard for admissibility is stricter than the petitioners would have it, it is not so strict as the *Frye* rule. The government concludes that the testimony of petitioners' experts was properly excluded in this case, however, because the evidence was so unreliable it could not have been helpful to a jury.

The Constitution: Justice for All?

Linda R. Monk and
Marcia A. Thompson

The 1993 Law Day theme, "Justice for All, All for Justice," summarizes the ideals contained in the U.S. Constitution. But at various times in our nation's history, those ideals have not always been reflected in reality. To African Americans, Native Americans, Japanese Americans, and women, for example, the Constitution has sometimes represented a promise for justice left unfulfilled. This teaching strategy allows students to examine four personal perspectives on the U.S. Constitution and evaluate how effectively they believe the Constitution guarantees "justice for all." These activities are adapted by permission from Perspectives: Readings on Contemporary American Government *and its teacher's guide (Alexandria, Va.: Close Up Publishing, 1993).*

Objectives

At the end of this activity, students will be able to:

1. discuss individual perspectives on the Constitution;
2. compare and contrast the various viewpoints on the Constitution;
3. formulate and express their own opinions about the Constitution; and
4. evaluate how well the Constitution guarantees "justice for all."

Procedures

For millions of Americans the true meaning of the Constitution goes beyond the actual text. Many people have passionate and diverse views about what the Constitution represents and whether it guarantees justice for all. Tell students they are going to read four personal perspectives on the meaning of the Constitution.

1. Distribute Student Handouts 1 through 4, "Perspectives on the Constitution" and Student Handout 5, "Views on the Constitution." Have each student complete Handout 5 using the readings in Handouts 1 through 4. Then have students work in groups of three or four to reach a consensus on their answers.
2. In a class discussion, explore student responses to each of the authors. Suggested discussion questions for each author are included below. Then have students examine and compare the views with which they agreed and disagreed. Are there any patterns? Have students write their own views on the handouts. What has influenced students' views? Do they find any correlation between people's backgrounds and their views? How well has the Constitution provided "justice for all"?
3. Finally, have students articulate their thoughts by writing a one or two-page essay on the topic "Equal Justice and the Constitution." They should model their essay after the "Perspectives" articles they have read. Their accounts should include a discussion of the personal meaning the Constitution has in their own lives, as well as how it has advanced the goal of "justice for all" in the United States. You might want to compile these articles in a class book with student illustrations.

Questions for Discussion

Ernest Green:
Why does Ernest Green value the right to equal status under the law? What does the Constitution mean to Ernest Green? How did the Constitution change his life? Do you think he did the right thing by attending Little Rock Central? Would you have done the same? Did his attendance there advance equality?

LaDonna Harris:
How does the Constitution protect Native American tribes? Have Native Americans always enjoyed constitutional protection? Do you agree with the notion of dual citizenship and dual entitlement? Why does LaDonna Harris think so many Americans, including Ronald Reagan, misunderstand Native Americans unique status as dual citizens? Do you agree or disagree?

Senator Daniel K. Inouye:
Why does Senator Inouye believe that the constitutional protection of rights for all citizens is important? What was his personal experience during World War II as the son of Japanese immigrants? Is national security ever a justification for denying rights to American citizens? Why or why not?

Norma McCorvey:
Why does Norma McCorvey value the right to privacy? McCorvey says, "The Supreme Court recognized in 1973 that individuals, weighing their individual circumstances, make better decisions than the state." Do you agree with this view as it applies to abortion? Why or why not? What would opposing groups say about this view? How does the right to privacy apply to other issues?

Linda R. Monk and Marcia A. Thompson are on the publications staff of the Close Up Foundation.

Student Handout 1

Perspectives on the Constitution: Equal Protection of the Law

When the U.S. Supreme Court handed down its historic *Brown v. Board of Education* decision in 1954, I was a student in Little Rock, Arkansas, finishing the eighth grade. Little Rock had one high school for blacks, Horace Mann High School, and one for whites, Little Rock Central High School.

While I may not have understood all of the constitutional issues surrounding the *Brown* case, I did recognize it as an opportunity for ending segregation in Little Rock and for helping me get a better education. At black schools, for instance, we had to use books that had first been used by white students.

The *Brown* decision made me feel that the U.S. Constitution was finally working for me and not against me. The Fourteenth Amendment provided for equal protection and due process under the law, but it also meant I could believe I was a full citizen in this country, not a second-class citizen as segregation had made me feel.

In the spring of 1957, I was asked, along with other black students in Little Rock, to consider attending Central High School the following fall. Initially, a number of students signed up to enroll but when fall came, only nine of us had survived the pressure to quit—and our names were published by the school board in the local newspaper. I knew this was my personal opportunity to change conditions in Little Rock. And I knew that if I didn't go, things would never change.

During the summer, rumors began to circulate that there might be violence if the "Little Rock Nine," as we became known, tried to attend school in the fall. I didn't pay much attention to what was going on. I was too busy trying to get ready for school to begin, doing a lot of reading and studying. I believed the world wasn't going to fall apart because nine black students were going to be admitted to a school with more than 2,000 white students.

But when we tried to attend school, we were met by an angry white mob and armed soldiers. Arkansas Governor Orval Faubus had called out the National Guard to prevent us from enrolling, defying a federal court order to integrate the Little Rock schools. Governor Faubus said he was doing this to protect the peace and tranquility of the community; obviously, my rights were secondary. It seemed strange to me at the time, and still does today, that the governor believed it was important to protect the rights of whites, but not those of blacks.

Finally, President Dwight Eisenhower called out the U.S. Army's famous 101st Airborne Division to protect us and enforce the federal court's integration order. "Mob rule cannot be allowed to override the decisions of our courts," the president declared. It was a powerful symbol that the President of the United States was willing to use his power and his might to protect nine black students and to uphold the Constitution.

When we tried to attend school again, about 1,000 paratroopers were there to protect us. We rode to school in an army station wagon, surrounded by army jeeps that were loaded with soldiers holding machine guns and drawn bayonets. It was an exciting ride to school!

Being kids, we joked about our each having our own personal soldier. When we got to the steps of Central High, the cordon of paratroopers formed a ring around us: they marched; we walked. I turned to Terrance Roberts, another one of the Little Rock Nine, and said, "I guess we'll get into school today."

Once we got inside, it was like being in a war zone. We were harassed, our books were destroyed, and our lockers were broken into several times a day. We learned not to keep anything important in them.

I was a senior that year. As graduation neared, I was surprised at the number of students who signed my yearbook, saying they admired my courage in sticking it out. But on the night of graduation, there was an eerie silence when my name was called. I didn't care that no one clapped for me. I knew that not only had I achieved something for myself, but I had broken a barrier as well.

One of the many life lessons from my high school experience is that you can express and act on unpopular beliefs. Secondly, we must all be willing to make the Constitution a living document, and lastly, you don't have to be an adult to do it. Only when we stand for what we believe in do we improve life for all Americans.

Ernest Green is managing director at the Washington, D.C. office of Lehman Brothers, an investment firm. He was the first black student to graduate from Central High School in Little Rock, Arkansas.

Student Handout 2

Perspectives on the Constitution: American Indians and the Constitution

American Indians are unique in the United States because they have dual citizenship: Indians are U.S. citizens as well as citizens of their tribes. This is because some Indian tribes are inherent units of government with jurisdiction over their own people and land. This sovereignty comes from international treaty law, not from the laws of the United States, although it is reaffirmed by them. As legal scholar Charles F. Wilkinson noted, "Indian tribes are part of the constitutional structure of government, but tribal authority was not created by the Constitution."

The sovereignty of Indian tribes was defined under federal law by the Supreme Court in the 1830s as the limited sovereignty of "domestic dependent nations." This sovereignty does not grant absolute power. For example, domestic sovereignty is the power of the tribes to govern their own affairs but not to make international treaties.

With dual citizenship comes dual entitlement. As citizens of the United States and of the state in which they live, Indians are guaranteed equal protection and thus equal entitlement to government services as all other citizens. This right is protected by the Constitution.

Under dual entitlement, Indians are entitled to services of the federal government as well as to additional services provided by treaties. Actually, services for Indian people, especially in health and education, predate by half a century or more services to economically disadvantaged people in the United States. Services in health and education should be thought of as payments on contracts to buy land from Indian nations. Honoring the U.S. treaties is more a property right than welfare.

Indian tribes make up approximately .5 percent of the nation's population, and collectively they govern 2.5 percent of all the land in the United States—an area larger than all of New England, with Pennsylvania and Delaware added. The more than 500 tribal, pueblo, and village governments are a part of the 39,000 governmental units that constitute the U.S. federal system, along with cities, counties, states, the District of Columbia, and the U.S. Trust Territories. American Indian populations increased dramatically between 1970 and 1980, and even greater increases are anticipated in the 1990s.

One of the responsibilities of tribes today is their duty to act as municipalities and provide the services commonly expected from governments. From this duty comes the authority to tax both Indian and non-Indian residents of a reservation to provide these services.

The exact governance of a particular group of Indian or Alaskan Native people is subject to immense variation depending on the tribe or group, their particular treaty or enabling statute, the races of the parties when an issue arises, the location of land, and the narrow tribal or state power involved in a particular issue. Some tribes are federally recognized and are affected by treaty relationships with the federal government, others were recognized by acts of Congress, and still others have state recognition instead of or in addition to federal recognition.

This multiplicity results in very complicated governance situations. On Navajo territory, for example, there are 22 different ways land is held. To understand these various governance situations, each must be considered on a tribe-by-tribe and state-by-state basis.

Because the history taught in U.S. schools is basically the history of European experience in the western hemisphere, it is almost impossible for non-Indians and even some Indians to understand the unique status of Indian tribes in the American system of governance. One such example was President Ronald Reagan's remarks to a student in Moscow in the spring of 1988.

When asked how the United States could justify its Indian policy, President Reagan replied: "Maybe we made a mistake in trying to maintain Indian cultures. Maybe we should not have humored them wanting to stay in the kind of primitive lifestyle. Maybe we should have said, 'No, come join us. Be citizens along with the rest of us.'"

But American Indians *are* citizens, and their unique culture is a great gift to the country as a whole. We hope that you, the future leaders of America, will become better informed about the history of the First Americans and become true partners with us in a brighter future for our nation.

LaDonna Harris is a member of the Comanche nation and president of Americans for Indian Opportunity, which works to strengthen tribal governments.

Student Handout 3

Perspectives on the Constitution: Japanese Americans and the Constitution

I was a 17-year-old high school student when World War II broke out literally in my backyard—in the skies above Pearl Harbor in Honolulu, Hawaii. My need to become totally involved in the war effort sprang from an insidious sense of guilt, the invisible cross lashed to the back of every "nisei" (those of us born in the United States to immigrants of Japanese ancestry) at the instant when the first plane bearing that rising sun appeared in the sky above Honolulu.

Of course, we had nothing to feel guilty about, and all rational people understood this. But every American of Japanese descent I knew carried this special burden and worked doubly hard because of it.

In December 1991, Americans recognized the sacrifice and bravery of our young men in uniform caught in the surprise outbreak of the war in Hawaii. Early 1992 marked the fiftieth anniversary of another wartime event, one that many Americans may not be aware of, but nevertheless exacted much pain and anguish on thousands who never set foot on a battlefield.

In February 1942, President Franklin Roosevelt signed Executive Order 9066, which authorized the internment of Japanese Americans, an unprecedented experience in the history of American civil rights. These Americans were determined by our government to be security risks, without any formal allegations or charges of disloyalty or espionage. They were arbitrarily branded as such solely on the grounds of their racial ancestry. As a result, loyal citizens lost their livelihoods and their homes, living as virtual prisoners in their own country.

Ironically, the same president who signed his name on the order also uttered these words as he authorized the formation of a combat team of loyal American citizens of Japanese descent: "No loyal citizen of the United States should be denied the democratic right to exercise the responsibilities of his citizenship, regardless of his ancestry. Americanism is a matter of the mind and heart; Americanism is not, and never was, a matter of race or ancestry."

As one who volunteered to fight with this combat team, I proudly exercised my right to defend the Constitution and my country. But across the ocean, in another part of my country, people who shared my Japanese ancestry were denied certain inalienable rights guaranteed by the Constitution.

Their rights were sacrificed under the cloak of national security. Too often, in the name of national security, it has been fashionable to deny Americans their rights. In this case, the Congress supported the president's policy of removal and detention by making the violation of orders issued pursuant to Executive Order 9066 a criminal offense.

Sadly, the United States Supreme Court upheld the removal and detention in the context of war. But as we know, the Supreme Court has not always been correct. There was a time when the Justices upheld slavery and that was the law of the land. The Supreme Court in this case upheld internment and that was the law of the land at that moment.

But years later, the presidentially-appointed Commission on Wartime Relocation and Internment of Civilians found no documented acts of espionage, sabotage, or fifth column activity by any identifiable American citizen of Japanese ancestry or resident Japanese aliens on the U.S. West Coast. This was supposed to have been the rationale for the mass evacuation and incarceration. In its 1983 report, the commission concluded that the internment was motivated by racial prejudice, war hysteria, and a failure of political leadership.

Although I lost an arm in combat, I consider myself fortunate because I was able to return home. Thousands of my fellow Japanese Americans who were interned volunteered to join the 442nd Infantry Regimental Combat Team—the most decorated World War II unit in the U.S. Army for its size and length of service. However, after the war, these heroes wondered if there ever would be a home for them again in this country.

The federal government's recent compensation checks and letters of apology for the internment pale against Japanese Americans' huge loss of pride and property and the many years of pain caused by the stigma of being branded disloyal. While the compensation may be a token amount, my hope is that this government action strengthens our Constitution by reaffirming our commitment to upholding the constitutional rights of all our citizens. We can demand no less of a commitment to preserve the very essence of what defines us as Americans.

Senator Daniel K. Inouye (D-Hawaii) has served in the U.S. Senate since 1963. He fought in World War II as part of a Japanese-American unit.

Student Handout 4

Perspectives on the Constitution: I'm Jane Roe

Norma McCorvey was "Jane Roe."

AP/WIDE WORLD

The Constitution is important to me because it protects the most basic right of all—privacy, including a woman's right to control her own body. That was not true in 1969, when I sought an abortion. Poor and pregnant, I was already the young mother of a child from a broken marriage. I had no job and no permanent place to live.

I tried to find a doctor who would perform an abortion, but because the procedure was illegal, the level of professionalism among practitioners was less than that of butchers who grind up hamburger. The clinics were filthy. The equipment was antiquated. And the likelihood of life-threatening injury and infection was high. Rather than risk death at the hands of some quack, I decided to have the baby and put it up for adoption.

Through an adoption attorney, I met two young lawyers, Sarah Weddington and Linda Coffee, who were looking for a plaintiff to challenge the Texas abortion law. I was still very young and insecure, and the thought of being in the limelight scared me to death. Also, I had a 5-year-old daughter whom I did not want to entangle in my politics. So Sarah and Linda came up with the "Jane Roe" pseudonym, and I decided to accept the challenge of seeking a legal abortion.

On March 3, 1970, *Roe v. Wade* was formally filed in the Dallas court system. I was between six and seven months pregnant. The court system moves very slowly. I honestly had thought that my court case would be settled in time for me to get an abortion, although I didn't realize that an abortion at that late stage of my pregnancy would have involved major surgery—a Caesarean section.

In June of 1970, I went into labor at two o'clock in the morning. My water broke, and I began hemorrhaging. I asked the hospital staff if the baby was a boy or a girl, but they refused to tell me or let me see it. I became hysterical because of the way they were treating me, and they had me sedated. Later, a nurse brought the baby girl to my room, telling me it was feeding time. When she realized her mistake, she snatched the baby out of my arms.

I am bound by a confidentiality agreement with the adoption court not to speak about this child, but I can say that giving her up was the most agonizing experience of my life. I hope that women who choose adoption today are treated with more sensitivity than I was back then.

Two and a half years later, on January 22, 1973, I read in a short article on the lower right front page of *The Dallas Times-Herald* that abortion had become legal. My initial reaction was that I had been cheated, because I did not have a choice regarding my reproductive freedom. Because I carried the "Roe baby" to birth, one of the ironies of my life is that I have never had an abortion.

For many years, I remained basically anonymous, except for occasional appearances as Jane Roe. But in 1989 I finally accepted myself as Jane Roe and stepped out of my political closet. I learned very quickly that there was a price to pay for this action. I became the target of vicious attacks. Aside from threatening letters and calls, baby clothes were thrown in my yard, my car was vandalized, and I was constantly afraid to go outside my home. Finally, late one night a car drove by and fired shotgun blasts through my front door. The first shot barely missed my head, and I now have almost no hearing in my right ear.

Decisions concerning childbearing are necessarily intimate, personal, and private. The Supreme Court recognized in 1973 that individuals, weighing their individual circumstances, make better decisions than the state. Although I never got to make that choice for myself, I'm glad that "Jane Roe" made freedom of choice possible for the women who came after her.

Norma McCorvey was the actual Jane Roe in Roe v. Wade, *the 1973 case in which the Supreme Court held that the constitutional right of privacy included a woman's right to choose an abortion.*

Student Handout 5

Views on the Constitution

Author	View of the Constitution	Basis for this View	Do You Agree or Disagree?
Ernest Green			
LaDonna Harris			
Daniel Inouye			
Norma McCorvey			

Teaching Strategy

Lesson Plan: Fractured Quotes on Justice

Suzin Glickman

Discussing what "justice" is has been a preoccupation of philosophers since the earliest days. Deciding how to make it a reality has preoccupied political leaders, writers, teachers and many others, from ancient times to the present day. As a result, the mine of justice quotations is one of the richest in existence. To extend this lesson, you might want to ask students to compile their own list of quotations on justice, from any of the myriad of quotation books available. Perhaps they could divide them by time periods—or country of origin—to see if they differ according to these categories. Or you might ask them to divide them by the gender or race of the speaker, or by occupation. Are the quotations of practicing politicians or lawyers different from those of professors or philosophers?

Objectives

To present an opportunity for students to consider what "justice" means, and to facilitate discussion. Students will become exposed to how justice was viewed by others throughout history. In addition, the activity will provide them with an opportunity to exercise creativity, synthesis and comparing and contrasting skills.

Note: This lesson can be adapted to teach about famous quotes by one individual, like Confucius or Martin Luther King Jr.

Target Group

High school, middle school or upper elementary grades.

Time Needed

One class period. The lesson was conceived as a way to introduce the concept of justice to students. It can be used at any point in such a discussion.

Methods

Fill-in the blank, compare and contrast, discussion. Students may work individually, in small groups, or as a class.

Materials Needed

Copies of the "Fractured Quotes" handout. Or, as an alternative, the quotes may be copied onto the board or a flip chart, and students can work on that.

Procedures

Introduce the topic by explaining to students that they are going to be discussing notions of justice. Next, distribute the handout and review the instructions for completing it.

Tell students to read the fractured quotes and have them fill in the words they think are missing. It may be helpful to complete the first quote together as a group or to provide students with a sample. Reinforce with students the idea that the topic they are considering is justice.

Students can share some of their responses with their classmates. You may want to record some of them on the board or on a flip chart (having the fractured quote already there would be helpful).

Next, distribute the sheet that has the actual quotes on them, identified by author. Along with the students, compare and contrast the quotes as completed by the students with the actual quotes. Students will enjoy this aspect of this activity, and may also be surprised and impressed by the fact that their answers may not be that different from the actual quote.

The activity is designed to spark discussion about the definition of justice. It is a nebulous concept and while its basic meaning—fairness—is universal, concepts and interpretations of it can vary greatly, as students will see during the activity.

Possible questions to pose to students could include:

- How is justice viewed in the U.S.? Do different groups have different views of what justice is and whether our society achieves it?
- How is justice viewed internationally? Do standards of justice resolve international disputes? What is the role of the World Court? Do the nations of the world agree on standards of justice?
- How can we pursue justice both locally, nationally and internationally?
- What are some of the consequences when justice isn't served or it fails? Are there self-correcting mechanisms in our systems (i.e., appeals, ability to change unjust laws through legislative action)?

At this point in the lesson, review the quotes and speak about them and the views of the persons who said them. Encourage students to grapple with the concepts of justice presented and develop their own definition of justice. Bring this aspect of the lesson to closure, establishing a context for further treatment of the topic of justice.

Suzin Glickman is education director, ACLU National Capital Area, Washington, DC.

Fractured Quotes: What Is Justice

Directions: Each of the quotes below attempts to define "justice" or indicate its importance. This exercise gives you the opportunity to express your views. Fill in the blanks, expressing as best you can your notions of justice.

1. Legal justice is the art of the ____________ and the ____________.
2. The love of justice in most men is simply the fear of ____________________________.
3. Man's capacity for justice makes ___________ possible, but man's inclination to injustice makes ___________ necessary.
4. One man's is ____________another man's ____________.
5. Why has ____________ been instituted at all? Because the passions of men will not conform to the dictates of reason and ____________ without constraint.
6. __________ anywhere is a threat to __________ everywhere.
7. Justice is truth in ____________.
8. ...the United States of America...established upon these principles of ____________, ____________, ____________, and ____________...
9. Justice, justice, shalt thou ____________.
10. There is no ___________ so truly great and godlike as justice.
11. There is no such thing as ____________—in or out of ____________.
12. Delay of ____________ is ____________.
13. Let ____________ be done, though the ____________ fall.
14. ____________ discards party, friendship, and kindred, and is therefore represented as ____________.
15. Whenever a separation is made between ____________ and justice, neither, in my opinion, is safe.
16. Justice is the sum of all ____________ duty.

Answers

1. "Legal justice is the art of **the good** and **the fair**."
   —Anonymous
2. "The love of justice in most men is simply the fear of **suffering injustice**."
   —Francois, Duc de la Rochefoucauld, 1613-1680.
3. "Man's capacity for justice makes **democracy** possible, but man's inclination to injustice makes **democracy** necessary."
   —Reinhold Niebuhr, The Children of Light and the Children of Darkness, 1944.
4. "One man's **justice** is another man's **injustice**."
   —Ralph Waldo Emerson, 1803-1882, Circles.
5. "Why has **government** been instituted at all? Because the passions of men will not conform to the dictates of reason and **justice** without constraint."
   —Alexander Hamilton, The Federalist, 1787-1788.
6. "**Injustice** anywhere is a threat to **justice** everywhere."
   —Martin Luther King, Jr., Letter from the Birmingham Jail, 1963.
7. "Justice is truth in **action**."
   —Benjamin Disraeli, Earl of Beaconsfield, Speech, February 11, 1851.
8. "...the United States of America...established upon these principles of **freedom, equality, justice** and **humanity**..."
   —William Tyler Page, 1868-1942, The American Creed.
9. "Justice, justice, shalt thou **pursue**."
   —The Bible, Deuteronomy 16:20.
10. There is no **virtue** so truly great and godlike as justice.
    —Joseph Addison, 1672-1719, *The Guardian.*
11. There is no such thing as **justice**—in or out of **court**.
    —Clarence Darrow, 1857-1938, Interview with *N.Y. Times*, April 19, 1936.
12. Delay of **justice** is **injustice**.
    —Walter Savage Landor, 1775-1864.
13. Let **justice** be done, though the **heavens** fall.
    —William Watson, 1602.
14. **Justice** discards party, friendship, and kindred, and is therefore represented as **blind**.
    —Joseph Addison, 1672-1719, *The Spectator.*
15. Whenever a separation is made between **liberty** and justice, neither, in my opinion, is safe.
    —Edmund Burke, 1729-1797.
16. Justice is the sum of all **moral** duty.
    —William Godwin, 1756-1836, *An Enquiry Concerning Political Justice* (1793).

Justice for **ALL** for Justice

A Potpourri of Law Week Activities

Since its establishment by a proclamation of President Eisenhower more than three decades ago, Law Day has become a truly national observance, reflecting an increased appreciation of the vital role played by law in American society. Over this span of time, Law Day activities have grown exponentially; in many communities, the number of planned activities has become too numerous to be limited to a single day—thus, Law Day has frequently become Law Week.

While the American Bar Association is the national sponsor of Law Day, a broad spectrum of organizations, both at the national and local levels, have become involved in Law Day activities. State and local bar associations, Young Lawyers Affiliates, Lawyers Auxiliaries, district courts, state departments of education, school districts, police departments, service and fraternal organizations, and other legal and educational organizations have come together in creative, cooperative efforts to sponsor and promote Law Day observances.

Given the ever-increasing number of Law Day activities, a complete review is impossible. What we have attempted to do here, with the help of the National Law-Related Education Resource Center, is to provide a sampling of Law Day/Week activities we have collected over the last two years.

Attorneys in the Classroom

One time-tested technique to bring knowledge about the law to elementary and secondary students matches local attorneys with local schools. In West Virginia, for example, the Young Lawyers Division of the state bar serves as a catalyst to link lawyers with students in every classroom in the state through its "Lawyer in the Classroom" initiative.

A variation on this theme is found in Maine, where the state bar association provides "Lawyers with Class" information packets for attorneys to use to supplement social studies units. The packets include question and answer sessions as well as suggested class activities and lessons plans. The bar, in conjunction with the Maine Law-Related Education Program, also serves as a clearinghouse to match lawyers and judges with fifth through twelfth grade classes across the state.

In Ohio, the Cleveland Bar Association, in cooperation with the Cleveland Public Schools, sponsors an Adopt-A-Class Program featuring members of the bench and bar who supplement a specially designed law-related curriculum by bringing their personal knowledge and experience to the classroom.

And the Winner Is ...

Poster and essay contests have long been staples of Law Day activities. Rhode Island has created a novel variation: video and button contests. Students in two categories, grades K-3 and 4-6, create and develop artwork that is suitable for reproduction on a button. The artwork must be keyed to an annual theme, which this year is "citizenship." To support and supplement this activity, teachers are furnished with lesson plans relevant to the contest theme. Winners is each grade category see their efforts crafted into buttons for the entire class and enjoy a pizza party hosted by the Ocean State Center.

Rhode Island high school students are eligible to compete in an annual video contest. The video must relate to the Law Day theme and be a wholly student-produced effort. Finalists are featured in a Law Day screening at the University of Rhode Island, where the winners are chosen by the members of the audience.

"Hello, Senator"

Last year, the Alaska State Bar sponsored a special call-in, interactive television program linking Senator Ted Stevens in Washington, D.C. with students at ten sites around the state. Arrangements for the satellite hookup were coordinated by Senator Stevens' office, and students were briefed in advance of the broadcast with packets of study materials which focused on issues related to the Constitution.

Courthouse Tours

While courthouses are a frequent locale for Law Day activities, a number of Law Day activities utilize this setting to highlight and focus attention on the workings of the courts. In Anchorage, Alaska, for example, state courts throw open their doors to the public for tours throughout Law Week. Another illustration of how the courts can be a resource can be found in Indianapolis, where the court is brought to students who witness an actual court hearing at the Indiana Children's Museum.

More Contests

Essay and/or poster contests are among the most enduring of Law Day activities. Generally, essay contests are aimed at middle or high school level students while younger students are invited to participate in poster contests.

The Young Lawyers Section of the Missouri Bar, in cooperation with the Missouri National Education Association, sponsors an annual Law Day essay contest open to all Missouri students in grades 4-5, 7-8, and 10-11. Winners have been honored at The Missouri Bar enrollment luncheon in Jefferson City during Law Week, and, in addition, the top three contestants receive savings bonds and see their essays published in an issue of *The Young Lawyer*.

The New Mexico Bar Foundation, the Albuquerque Bar Association, and the Albuquerque Lawyers Club have cosponsored a Law Day poster contest for elementary through high school students. Winning posters are displayed at a Law Day luncheon to which students, parents, and community members are invited. Contest sponsors are also exploring the possibility of extending the impact of the contest by having the winning posters displayed on buses and billboards in the area.

In Vermont, the Young Lawyers and the Public Education Committee of the Vermont Bar Association sponsors statewide essay contests for students at various grade levels, from elementary through secondary. Winners are honored at a special ceremony held at the Superior Court House.

Perhaps the most common form of recognition accorded student efforts is an invitation to Law Day luncheons extended by state bars or bar-affiliated groups, such as state bar auxiliaries. Such social events allow students and attorneys to relate to each other on a personal, one-to-one basis, and often initiate and enhance attorney participation in various LRE activities.

This Is a Test...

The Constitutional Rights Foundation Chicago, in cooperation with the Illinois State Bar Association and the Illinois State Board of Education, creates and distributes a law test and discussion guide to social studies chairpersons throughout the state. Featuring several brief case descriptions as background, the test is designed to stimulate student discussion of and interest in current "hot" issues, whether at the local, state or national levels.

Come to the LRE Fair

A law fair for 3rd through 6th grade students has become a traditional part of Law Day observances in New Jersey. Sponsored by the New Jersey State Bar Foundation, the two-day event features two sessions per day attended by more than 800 students from all parts of the Garden State. Activities are structured to engage young people in a number of ways, and in past years have included a Bill of Rights exercise led by a superior court judge, discussions led by lawyers and judges, and performances of brief mock trials by elementary students. New Jersey's Law Day efforts have been cited by the ABA as one of its model Law Day programs.

Recognizing Mock Trial Winners

Many states salute the winners of their statewide mock trial competition on Law Day, with the most frequent vehicle for the recognition ceremony being the traditional Law Day luncheon. The size and scope of the activity varies, with some states inviting only the winners or semi-finalists, while others, such as Hawaii, in a program cosponsored by the Young Lawyers Division of the state bar and the state department of education, recognize all the students, attorneys, judges, and others who participated in the program.

A novel variation on the mock trial model is found in Nevada, where attorneys rather than students present mock trials in the schools. The Goldilocks trial was presented in elementary schools while First Amendment cases were highlighted for secondary level students.

Matching Grants

The Nebraska State Bar provides small matching grants to local bar associations to support a variety of Law Week activities such as school visits by lawyers and legal paraprofessionals, poster competitions, and mock trials. Field trips to assorted facilities including court houses, jails and law enforcement centers are other student activities that receive funding from the bar.

Moot Courts: A Popular Choice

Another favorite Law Day activity focuses attention on state moot court competition. In North Carolina, the state bar hosts a moot court competition involving as many as 65 teams, with finalists competing on Law Day in the chambers of the state supreme court.

A civil law moot court competition, co-sponsored by the state bar association, has become a Law Day fixture at Project P.A.T.C.H. on New York's Long Island. After studying a unit on civil law during the school year, competing teams of students are allowed 10 minutes to study an index card giving a brief outline of a civil case. A witness and an attorney are chosen to represent each team in front of a judge(s) in a 20-minute-long moot trial. With no time to memorize, students are forced to "think on their feet" in a high-pressure courtroom simulation that puts their reasoning skills to the test.

Poster Mailing

In Georgia, a poster does double duty to promote Law Day activities. With a student-designed poster on one side (the winner 8th grade competition) and a listing of helpful information for observing LRE Week on the other, this effort of the Georgia LRE Consortium is distributed statewide. Included on the back side of the poster are rationales for observing LRE Week, lists of some selected special events, a list of national LRE organizations that provide informational materials, and a roster of judicial circuit committees for LRE throughout the state.

Enter Stage Right

The law came to the mall at two regional shopping centers in Fairfax County, Virginia, where the children's play "The Big Bad Wolf v. Curly Pig" was presented. In Nevada, the state bar's Young Lawyer Division sponsored the showing of the videotape *State v. Goldilocks* to elementary school students, followed by a discussion with the attorneys.

Mayor for a Day

Students take over city hall in Bristol, Connecticut, in a program sponsored by the local bar in which students are "elected" to offices in the city government and accompany their counterpart city officials throughout a portion of Law Day.

Student Conferences

In South Carolina, many school activities focusing on Law Week culminate at the Student Citizenship Conference at Columbia, S.C. High school essay contest winners are announced, poster contest winners are honored, and as many as two dozen different break-out sessions are scheduled. Featured topics have included teen violence, search and seizure in the schools, racial tension, freedom of expression, date rape, mediation, and mock trial demonstrations. Participants are chosen on a first come, first served basis, with every high school in the state receiving a letter requesting the participation of 10 students. One unique feature of the team selection process matches five "high achievers" with five alienated, non-participating students. Each team of students attending the conference must make a presentation to their home school afterward. In 1990 (its first year), the conference was attended by 277 students, with 20 schools turned away for lack of space.

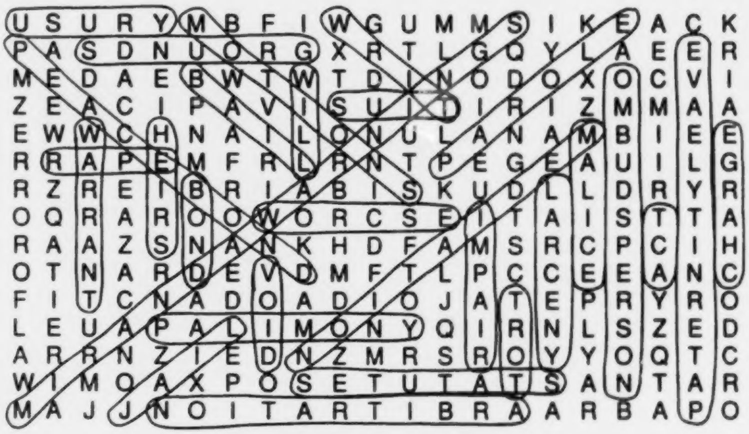
In Illinois, the Constitutional Rights Foundation Chicago has organized Law Day conferences for more than 100 eighth graders and nearly 300 high school students. Federal courtrooms in Chicago host several concurrent point/counterpoint sessions on controversial legal topics presented by volunteer attorneys and representatives of organizations relevant to the cases. Students are actively involved in the discussion and are asked to vote on the issues presented.

In Oregon, the state bar and Portland State University co-host a Law Day conference. An estimated 800 to 1,000 high students participate in workshops dealing with topics such as Music and Offensive Parts Prohibited, Living with AIDS, Girls and Guys—Double Standards, From Here to Paternity: Condoms and Conundrums, Student Job Rights, Sacred Sites vs. Property Rights, The Right to Hate, Abuse within the Family, and Federal and State Prosecution.

In the Book

The Oklahoma Bar Association has compiled a Law Day Project Workbook packed with hundreds of projects, mock trials, curricula for teachers, Law Day plays, and directions on how to develop activities such as courthouse tours and "Lawyer for a Day."

Note: If we have failed to mention your Law Day/Law Week activity, please be sure to send us a description (and photos, if available) for inclusion in next year's listing. Send it to: ABA/YEFC, 541 N. Fairbanks Court, Chicago, IL 60611-3314.



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11. Larceny
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13. Mediation
14. Miranda warnings
15. Motions
16. Ombudsperson
17. Palimony
18. Parole
19. Paternity leave
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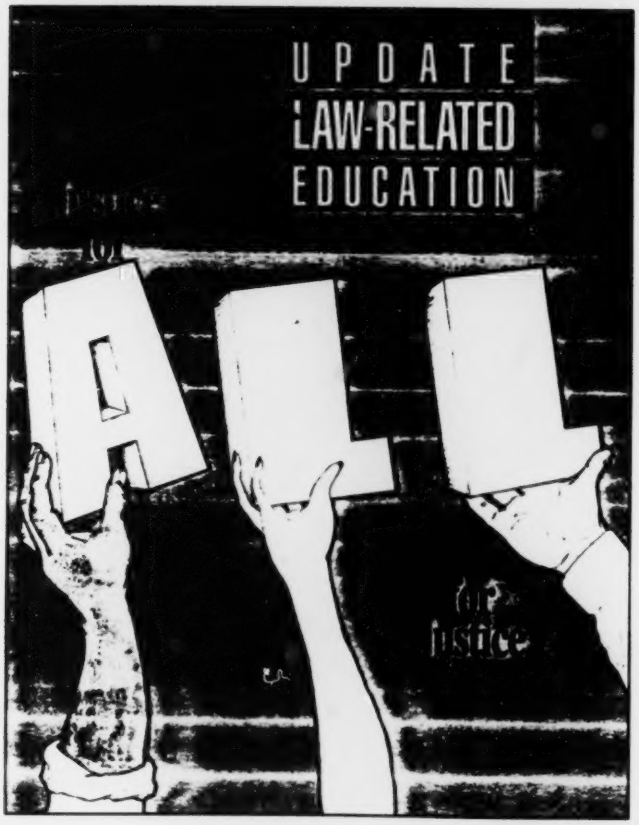
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Special Committee
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UPDATE ON LAW-RELATED EDUCATION

Law and U.S. History

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Introduction

This issue of *Update on Law-Related Education* focuses on the "Law and United States History." With state and national debates raging concerning what should be included in future social studies curriculum, it is timely to emphasize the value of looking at American history through the lens provided by the law. Law-related educators have a well-deserved reputation for bringing the social studies classroom alive for students through a wide range of active and innovative teaching strategies.

The interest generated in students is also directly related to the fact that using the law to access U.S. history helps bring the past alive, making it personally relevant, to a degree too often missing in traditional classrooms. Students come to see people in real life situations and conflicts struggling in a historic context, attempting to better the lives of their families, communities, states and nation. These efforts are no longer irrelevant and impersonal episodes; instead teachers are able to use this past to discuss the many and varied aspects of the current rights and responsibilities of citizens. Students can thus begin to see how the present is inextricably linked to the events of the past, and by implication, how the future is dependent upon their own actions as citizens.

Approaching U.S. history through use of the law is effective because it opens so many windows to the past. Whether the goal is to discuss the Constitution, governmental institutions, the separation of powers, individual or group civil rights, criminal law, social mores or the evolution of these (and many more) elements of American history, the law provides interesting access to the past. Any and all of these topics will help the individual student have a better understanding of their society's history and add to their understanding of the relationship between citizens, between citizens and governmental institutions, and the role of the law and courts in regulating these ties. While law-related education has certainly evolved tremendously over the past three decades, a vital common core remains: that is the goal of educating the individual student for an effective and responsible life within the many communities in which they will live.

Eric S. Mondschein and Gregory S. Wilsey
Guest Editors

Opening Statement

> Americans are not bound together by a common religion or a common ethnicity. Instead, our binding heritage is a democratic vision of liberty, equality, and justice. If Americans are to preserve that vision and bring it to daily practice, it is imperative that all citizens understand how it was shaped in the past, what events and forces either helped or obstructed it, and how it has evolved down to the circumstances and political discourse of our time.

So wrote the Bradley Commission on History in Schools in its 1989 report. Today, as America becomes more diverse, more mobile, and less connected to the past, the need to underscore and reinforce this "binding heritage" becomes more acute.

Certainly, nowhere is this need more keenly felt than in the classroom. In a culture that equates peer acceptance and successful socialization in terms of the latest and newest, teachers are challenged to find ways to engage students in the study of the people and events of the past.

One effective technique is to use the law as an entry point to the study of U.S. history, and that is what this issue is about. The articles, teaching strategies and curriculum review that follow, thoughtfully brought together by guest editors Eric Mondschein and Gregory Wilsey, Director and Assistant Director, respectively, of the New York State Bar Association's Law, Youth & Citizenship Program, demonstrate how the law can be used effectively to teach U.S. history. This issue will look at what cases and themes can be used to teach the past, show how study of a single issue of current significance can be traced throughout American history, detail some of the various strategies that work well in the classroom, and suggest a number of resources that can be employed to link the law to history, thus bringing to life the richness and breadth of the American experience.

Jack Wolowiec
Editor

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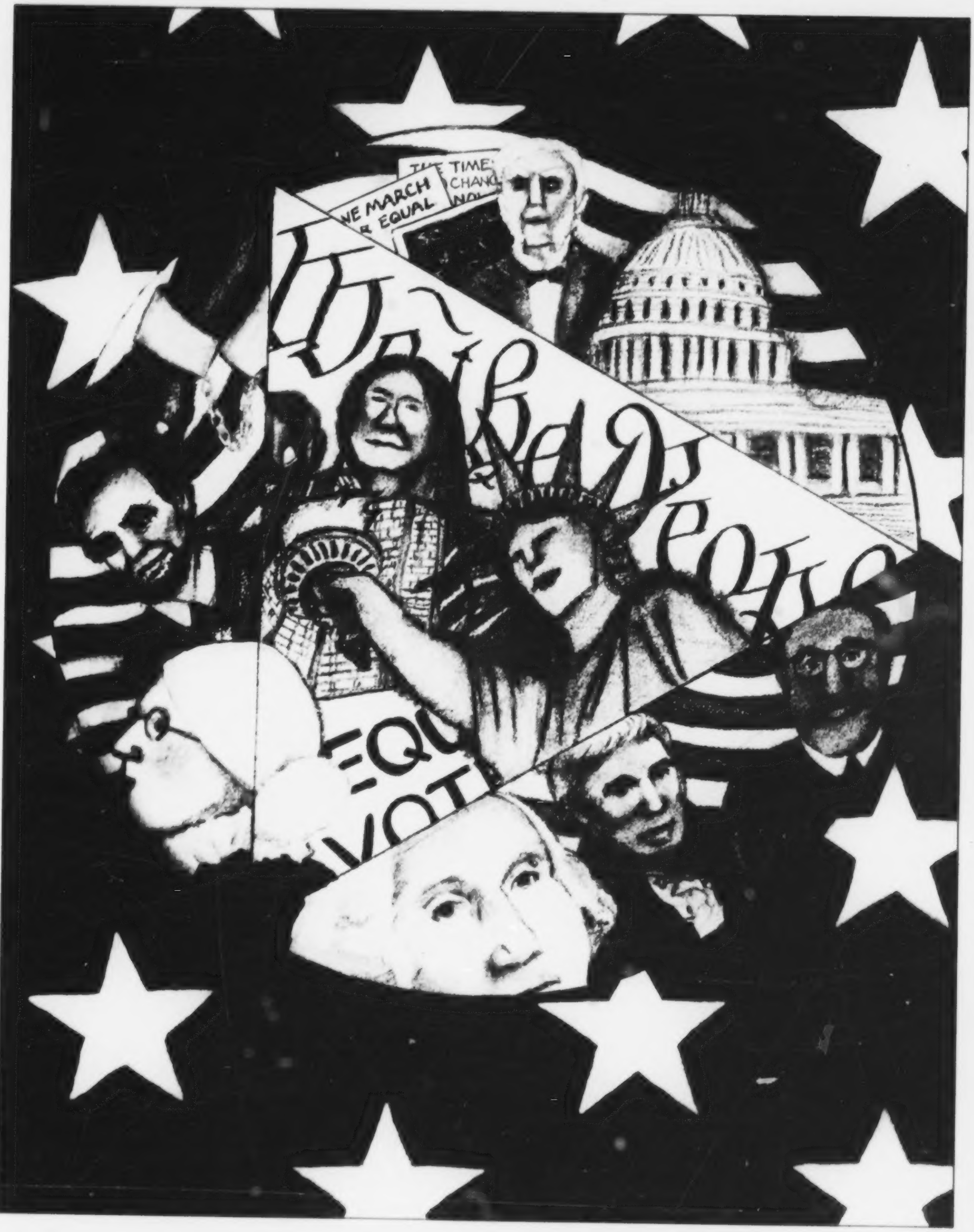
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Law and U.S. History

The Law in United States History: A Kaleidoscopic View

Isidore Starr

The intimate relationship between the law and United States history is recognized today in educational mandates requiring instruction in the Constitution of the United States and the Bill of Rights, the state constitution, American ideals, citizenship, rights and responsibilities, loyalty, morality, and voting. This is almost universal in state educational laws. In addition, it is not possible to teach the history of our country without delving into the many ways in which the law influences our economic and social behavior, as well as our role in what is now being referred to as "the Office of Citizen." Certainly, in a country which treasures such maxims as "ours is a government of laws and not of men," "ignorance of the law is no excuse," and "we live under the rule of law," it could conceivably be considered educational malpractice to teach the history of our country without focusing on the law as a fundamental force in the transformation of 13 colonies into one of the greatest nations on the world scene.

What follows is a recommended kaleidoscopic view of the traditional approach to United States history as seen through five overarching ideas associated with the law:

- the idea of *power* as it relates to governors and governed;
- the idea of *liberty* as defined by First Amendment freedoms;
- the idea of *justice* as delineated in the due process clauses in the U.S. Constitution,
- the idea of *property* as it encompasses the uses of private property, private enterprise, and the general welfare; and
- the idea of *equality* as it pertains to civil rights.

The metaphor of the kaleidoscope will take us into six periods of our history where we will view the interplay of these five ideas.

It has been pointed out that there is a "love-hate" relationship between power, on the one hand, and the other four ideas. As a matter of fact, there are times when any one of these ideas can be on a collision course with one or more of the others. But this is precisely why a law-oriented approach is so intriguing; it forces us to confront priorities and hierarchies of values.

Colonial America: The Forge of Constitutionalism

The early settlers who came to this country brought with them as part of their cultural capital the landmark blows against the belief in the divine right of kings: Magna Carta (1215), Petition of Right (1628), Habeas Corpus Act (1679), the English Bill of Rights (1689), and the English common law with the great Lord Coke's warning that God and the law were above the king. The remembrance of franchises, immunities, and liberties of Englishmen were nourished by a geographic frontier which encouraged experiments with constitutional arrangements. In the forge of the New World, the settlers transformed their power in the state of nature, as it must have seemed to them, into legitimate authority through covenants, constitutions, and documents relating to human rights. The Pilgrims drew up their Mayflower Compact creating a society as a first step in the formation of a government, while Connecticut is credited with the framing of the first constitution.

These experiments in governance contributed to our contemporary views of democracy, representative government, and constitutionalism. The New England town meeting with its direct democracy and the Virginia House of Burgesses regarded as the first representative assembly in the colonies served as precedents for participatory government. The seeds of constitutionalism were sown in the quest for a higher law whether it was God's law, Biblical precepts, or natural law. Church covenants served as precedents for secular compacts, such as formal constitutions. Eventually,

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Isidore Starr is Professor Emeritus of Education at Queens College of the City University of New York. Dr. Starr, widely recognized as "the father of law-related education," has written numerous books and articles on LRE subjects and is a member of the Advisory Commission to the ABA Special Committee on Youth Education for Citizenship.

the idea of constitutionalism emerged on the political scene with its historic corollary that no one—but no one—is above the law as expounded in the written constitution.

* * *

The theocratic, autocratic, and authoritarian governments in the colonies could not still the voices of liberty. In Massachusetts, even though John Winthrop referred to the magistrates as "gods upon earthe," their opposition to the Body of Liberties (1641) could not prevent its ultimate passage. This historic step toward constitutionalism eventually became a part of the 1648 code of Laws and Liberties of Massachusetts. However, despite this step in the direction of the idea of liberty—a small step—those who opposed the orthodoxy of the established church were persecuted, prosecuted, exiled, or executed. The stories of Roger Williams, Mary Dyer, Anne Hutchinson, as well as the hysteria accompanying the Salem witchcraft trials, are reminders of the intolerance practiced by public officials and accepted by the community.

The spirit of liberty remained alive through the efforts of a small number of visionaries. Roger Williams preached religious liberty and the necessity of a "wall of separation between the garden of the church and the wilderness of the world." The Maryland Act of Toleration of 1649 granted religious tolerance to all who believed in Christ, while William Penn went one step further by extending tolerance to all who believed in God. In 1776, a month before the Declaration of Independence, George Mason's Virginia Declaration of Rights provided for "the free exercise of religion, according to the dictates of conscience." In 1735, John Peter Zenger, the New York printer, was acquitted of seditious libel, thereby putting a small dent in the pattern of state censorship.

* * *

Justice as defined by due process of law was included in the landmark British documents from Magna Carta to the English Bill of Rights, as well as in colonial documents such as the Massachusetts Body of Liberties and the Virginia Declaration of Rights. Included were provisions relating to trial by jury, double jeopardy, coerced confessions, and cruel and unusual punishments.

The famous trials which we associate with this period are those of Roger Williams, Anne Hutchinson, Mary Dyer, the Salem witchcraft proceedings, and John Peter Zenger. Anne Hutchinson was subjected to double jeopardy, being tried both by church and state, which in a sense represented the same jurisdiction. Those accused of witchcraft were tortured and 19 were executed, while Dyer was hanged and Rogers and Hutchinson were exiled.

On a happier note, the Zenger case was distinguished by jury nullification of the judge's instructions to apply the law of seditious libel. The New York printer was found not guilty and truth eventually became a defense in sedition cases, with the jury determining the facts and the application of the law.

The legal net aimed at criminal conduct included the usual range of assault to murder, but reached out in its sumptuary legislation to condemn tippling, gambling, smoking of tobacco, and amusements, such as Sunday sports. Lying, idleness, and disobedience of children were included for good measure.

It is especially interesting to look back at that time to see how the punishments were devised to fit these crimes. Viewing "shame" as a major component of punishment, officials used the pillory, stocks, whipping, branding, and the cutting off of ears. Capital punishment was meted out to those convicted of witchcraft, murder, buggery, blasphemy, adultery, idolatry, and rape. A disobedient child, 16 years of age and "of sufficient understanding" could be put to death. This was accompanied by mitigating circumstances, such as parental neglect or "extreme and cruel correction."

In addition to the usual court system of trials and appeals, there emerged at the time an unusual experiment with arbitration. Perhaps due in part to the widespread suspicion of the legal profession, Pennsylvania instituted a system under which each precinct appointed three individuals as "common peacemakers" whose arbitration was "as valid as the judgments of the Courts of Justice." A number of other colonies followed Pennsylvania's lead.

* * *

When Jamestown and Plymouth were settled, there arose a legitimate issue of property rights: Who owned the land? Was it the Native Americans who lived there; the country whose explorers claimed it; or the settlers who settled there? If possession is 9/10ths of the law, as the expression goes, was that applicable at the time? Recent court cases relating to the land claims of Native Americans have revived this dormant issue.

Property ownership was widespread and it varied from small farms in New England to the patroonships of New York to the plantation system of the South with its legal structure relating to masters and slaves. The law had to grapple with the dilemma of viewing slaves as human beings or as animate objects.

Property ownership became the core of civic participation. It was a requirement for suffrage and public office, on the assumption that property owners, whose interests were protected by government, would be the bastions of stability.

Mercantilism, the dominant economic-political policy at the time, was characterized by government regulation for the benefit of the state. This was reflected in local controls over prices and wages. In some areas of the economy, free enterprise persisted.

* * *

Despite voices such as that of Abigail Adams, equality was a distant dream. Women, as well as indentured servants, children, and Native Americans were disadvantaged in many ways. Slavery was a recognized institution in the law. Among the bright spots were the abolition of primogeniture, dower for married women was recognized, and wealthy women were in favored positions as executrixes of their husband's property. Women were able to invoke equity procedures in the courts to protect their property from reverting to their husbands. According to Albie Sachs and Joan Hoff Wilson, the legal position of women during the colonial period was far better than in the post-Revolutionary era.

The Declaration of Independence, the Constitution, and the Bill of Rights: The Anvil of Constitutionalism

American constitutionalism is enshrined in the three documents noted above. They were written during one of those extraordinary periods when the forces of history and the ideas of the law merged to produce milestones in constitutional philosophy. It was during 1776-89 that our country became the focal point for constitutional documents and debates which have influenced the world.

The tension between Crown and Parliament, on the one hand, and the colonies, on the other, relating to power can be best understood using the metaphor of Newtonian physics. The British viewed the constitutional arrangement as a political system with Britain at the center and the colonies, like planets, drawn to the mother country by the centripetal forces of the British Constitution, the common law, a common language, and common customs. The colonial perspective was very different. They saw it as a social contract between king and colonies, complicated by the centrifugal forces of distance, frontier psychology of independence, and innovative thinking about colonial and imperial relationships.

When Britain resorted to the Stamp Act, the Townshend Acts, and the Coercive or Intolerable Acts, the stage was set for a confrontation. The consequences were a constitutional confrontation of awesome magnitude. This was the time when the colonial experiments in government were pounded into historic form on the anvil of constitutionalism.

The Declaration of Independence is both a legal and constitutional document. In colonial law, a declaration was a special form of pleading consisting of several parts: a preamble, the relevant law, the grievances, and the conclusion. What Jefferson did was to transform this ancient form of the law into the historic birth certificate of the American nation.

As a legal document, the pleading is addressed to "the Supreme Judge of the World" and perhaps to the jury of "mankind." What is extraordinary about the reasoning is that there is no reference to the rights of Englishmen. Instead, the law invoked is that of universal human rights. In addition, Jefferson incorporates such historic timebombs as inalienable rights, (life, liberty, and the pursuit of happiness), all men are created equal, and government by consent of the governed.

The result was a war for independence accompanied by one of the most prolific periods of constitutional development. Eleven constitutions were written, nine state and two national. In addition, provision was made for the governance of new lands and the admission of new states.

Like the Mayflower Compact, the Declaration of Independence was prologue to the framing of a constitutional form of government. In transforming the dream into a reality, the first constitutional experiment was with the Articles of Confederation, an arrangement in which the newly created central government could be easily victimized by the powerful states. Reduced to requisitioning revenues and troops, the central government lacked the power to evoke respect at home and abroad. The Congress under the Articles did pass one of the most important laws in the history of our country—The Northwest Ordinance of 1787. It incorporated the first bill of rights enacted by the federal government; abolished slavery in the territory; provided for the creation of states; and stipulated that the new states will be admitted on "an equal footing with the original thirteen states."

The tribulations of the federal government under the Articles eventually led to the calling of the Constitutional Convention with its historic deliberations. In turn, the ratification process engendered the famous debates between Federalists and Anti-Federalists in which the demands for a Bill of Rights eventually won the day.

Our Constitution and Bill of Rights are a treasure-trove of provisions relating to the ideas of power, liberty, justice, property, and equality. The idea of power is referred to more than 20 times in the form of separation of powers, division of powers (federal system), enumerated powers, reserved powers, powers denied, and most important, "We The People" as the source of power in a republican government.

The idea of liberty is written large on the marquee of eighteenth century events—the dramatic struggle against governmental tyranny, as viewed by the colonists. Liberty is defined operationally in the First Amendment and the last sentence of the substantive provisions of the Constitution is unique in its mandate that: "*no* religious Test *shall ever be required* as a Qualification to any Office or public Trust under the United States." (italics supplied) This seems to be the only provision mandating "never."

The idea of justice is found in such provisions of the original Constitution as bills of attainder and ex post facto law, treason, trial by jury in criminal cases, and habeas corpus. Amendments IV, V, VI, and VIII in the Bill of Rights clarify the dimensions of justice as viewed by the Framers and Founders.

In 1913, Charles A. Beard published *An Economic Interpretation of the Constitution of the United States* and thereby started one of the most important debates in American historiography. Was our Constitution the product of "pocketbook patriotism" or "altruistic idealism?" Were the

Framers trying "to feather their nests" or striving for "liberty, justice, and stability?"

The debate still simmers, but it is generally agreed that the Constitution is an economic document which protects property but does not mandate any specific type of economic system. In the original document, the protection of property takes various forms: patents and copyrights, bankruptcy procedures, contracts, and debts incurred under the Confederacy.

The Bill of Rights is an especially rich depository of property rights. The Second Amendment protects the right to bear arms and the Third Amendment offers protection against the quartering of soldiers. The Fourth Amendment was a response to the hated writs of assistance and it confirms the common law principle that "a man's house is his castle." The Fifth Amendment surrounds property with the shield of due process of law and assures property owners that their property may not be taken for public use without just compensation. The latter right is being transformed these days into the "takings" clause with serious constitutional implications relating to the meaning of "for public use."

As for equality, Thomas Jefferson's condemnation of the slave trade in his draft version of the Declaration of Independence had to be omitted because of southern opposition. The principle that "all men are created equal" continued to reverberate throughout the years with explanations and interpretations designed to place it in the context of the prejudices of the time. The seeds it planted in the minds of people are still tormenting the conscience of the body politic.

The Framers of the Constitution recognized slavery with such euphemisms as "person" and "persons." Inequality was the order of the day for women and Native Americans.

From Washington to Lincoln

Between Washington, Framer and Founder and First President under the Constitution, and Lincoln, the preserver of the union, stands John Marshall, Chief Justice of the United States from 1803 to 1835. Through the force of his personality and the power of his intellect, he transformed the Supreme Court from "the least dangerous" branch of government, in the words of Hamilton, into the most powerful. In his more than 500 opinions, he changed the course of our history through the doctrine of judicial review.

In the famous case of *Marbury v. Madison*, Marshall justified the Court's power in declaring a law of Congress unconstitutional. From that precedent, he extended the power of the Court by declaring state laws unconstitutional and by ruling that the High Court had the power to review the rulings of state courts, including their highest tribunals, in cases involving federal issues. When reference is made to "he," it should be remembered that he was speaking for the other Justices who followed his lead.

Three of the important rulings focused on property rights. In *Dartmouth College v. Woodward* (1819), the Court underscored the sanctity of contract and the importance of protecting private property. Nine years earlier in *Fletcher v. Peck*, the Marshall Court had declared unconstitutional an act of a state legislature which had canceled contracts based in grants made by a previous, corrupt legislature. In *Gibbons v. Ogden* (1824), regarded by some as his greatest case, Marshall interpreted the interstate commerce clause to create a common market unencumbered by state or regional barriers. The result was a bonanza for economic activity.

With the advent of Jacksonian democracy, the doctrine of vested interests or property rights underwent a transformation under Chief Justice Taney. His opinion in *Charles River Bridge v. Warren Bridge* (1837) declared that a state charter to a private corporation to build a bridge did not confer on the grantee monopoly rights or exclusive privileges. A distinguished constitutional scholar, Stanley I. Kutler, has described this ruling as judicial "creative destruction" of vested privilege in favor of the release of energy to pursue innovative programs in the public interest. In other words, there are times when the police powers of the state take priority over the property rights of corporations or individuals.

As the nation approached mid-century, a constitutional crisis was in the offing. The power struggle between the states and the federal government over the issue of whether the union was a compact among the states or a union of "We, the People," took center stage. The attempt of the Supreme Court to resolve it proved futile and the issue was joined on the battlefield.

* * *

Exploring the idea of power during this period takes us into two major confrontations. The gradual emergence of the doctrine of judicial review did not go unnoticed by three presidents. Jefferson referred to the Court as "the subtle corps of sappers and miners constantly working under the ground to undermine the foundations of our confederated fabric." When John Marshall handed down a decision upholding the right of the Cherokee Indians to certain lands in Georgia (*Worcester v. Georgia*, 1829), Jackson's response to Georgia's refusal to obey is reported as: "Well, John Marshall made his decision, now let him enforce it." Although there is no proof that Jackson made this remark, the ruling was not carried out. In turn Lincoln condemned the Dred Scott decision and warned in his First Inaugural that if the people were to permit the Supreme Court to decide with finality all "vital questions" affecting the fate of the Nation, they "will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

The second great confrontation grows out of the issue of states' rights, or the compact theory of the Constitution. In 1798-99, the states of Kentucky and Virginia drew up a set of resolutions written by Jefferson and Madison, condemning the Alien and

Sedition Acts. The union, it was argued, was a compact among the states with the states possessing the power to declare laws null and void. This theory was echoed at the Hartford Convention (1814) as justification of opposition to the War of 1812.

What seemed at the time as verbal sparring and impotent protest took on a more serious threatening tone when South Carolina revived the nullification theory with its "Exposition and Protest" against the "Tariff of Abominations" followed by its Ordinance of Nullification of 1832. All of this was prologue to the eventual secession of the South and the ensuing Civil War.

* * *

The First Amendment suffered a number of serious blows during this period. The first occurred during the undeclared war with France in 1798-99, when the Federalist Party pushed through the Congress which it controlled the Alien and Sedition Acts. The latter, framed in the name of national security, provided severe penalties for anyone who uttered or published any "false, scandalous, or malicious" statement concerning the president or the Congress, or attempted to bring them into "contempt or disrepute." Why wasn't this law appealed to the Supreme Court? Was it because the Justices were all Federalists or was it because *Marbury v. Madison* had not yet been decided? Or was it more desirable at this time to delineate the states' rights theory of nullification of federal legislation? Certainly, here is an intriguing constitutional and historical question.

Surrendering to pressure from Southern leaders, the House of Representatives in 1836 passed the "Gag Resolution" preventing any member of the House from reading any petition supporting the abolition of slavery in the District of Columbia. It remained in effect for eight years, despite the First Amendment's right to petition.

The Civil War brought with it widespread violation of the First Amendment. Newspapers were suppressed; the writ of habeas corpus was suspended by President Lincoln; and many civilians were arrested and imprisoned by military authorities.

* * *

The idea of justice and lack of justice permeated the national scene. Between the 1830s and the 1850s, vigilante justice played an important role in the West and parts of the South. Tarring and feathering became a regional sport—a form of vigilante punishment.

In cities like Boston and New York, the emergence of police forces marked a milestone in professional crime fighting. At the same time, experiments were taking place in the field of penology with reference to prisons, jails, and penitentiaries. Beatings, straitjackets, solitary confinements, and imposed silence were still the order of the day.

A number of interesting trials took place which give us an insight into due process of law. The Sedition Trials, the trial of John Brown, and the case of *Ex Parte Milligan* (1866) offer us different perspectives on the judiciary at work.

* * *

The striving for equality during this period represents an important insight into constitutional and legal tactics to achieve desirable ends. When Congress failed to solve the slavery question through compromise, a test case was used to involve the courts. Since slavery was recognized in the law as the right to own another human being, perhaps the law could be used to change the law. In *Dred Scott v. Sanford* (1857), this laudable attempt came to naught. In a 7 to 2 ruling, the High Court, speaking through its Chief Justice, Roger B. Taney, declared:

> . . .the right of property in a slave is distinctly and expressly affirmed in the Constitution. . . . The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Men and women, white and African American, played an important role in the abolitionist movement. Women also took a leading role in suffrage and education. The meeting in Seneca Falls with its Declaration and Resolutions on Woman's Rights in 1848 declared that "all men and women are created equal," but progress was slow in coming. Seminaries and schools for girls were established and women made their appearance as physicians, nurses, teachers, and ministers, but the much anticipated Married Women's Property Act did not liberate them from the legal requirement that the husband's permission had to be obtained to enter into contracts relating to property.

Native Americans did not fare much better. The Cherokee "Trail of Tears" is still commemorated in an outdoor pageant in Oklahoma. The Supreme Court rulings at this time created a maze of constitutional problems relating to the tribes as sovereign nations.

Economic Wilding and Economic Regulation: 1865-1900

Praise them as captains of industry or condemn them as robber barons, they were entrepreneurs intoxicated with the laissez-faire atmosphere of the post-Civil War period. They combined property with ingenious legal arrangements to create giant corporate combines which dominated industries. These economic practices, combined with political corruption on the national and local levels, outraged public opinion and evoked government action.

Wilding—a term recently associated with a savage attack by juveniles on a young woman in New York—is being applied by writers to reckless and lawless activities of even pillars of society. Although analogies are risky, the practices of Carnegie, Rockefeller, Vanderbilt, and Morgan in steel, oil, railroads, and finance in restricting competition and creating monopolies were types of economic wilding which demanded government intervention.

The result was such state legislation as the Granger Laws, and the Interstate Commerce Act (1887), followed three years later by the Sherman Antitrust Act.

The Supreme Court's initial reaction was favorable and in *Munn v. Illinois* (1877) the Granger Laws regulating railroad and grain elevator rates were upheld under the law of public utilities as "industries affected with a public interest." In time, however, under the leadership of Justice Stephen Field, the Court gave constitutional priority to property rights over the police power of the state. This confrontation between the idea of property in a laissez-faire economic system and the idea of power in the public interest carried over into the twentieth century.

* * *

It was during this period that the idea of equality was finally incorporated into the Constitution as the Thirteenth, Fourteenth, and Fifteenth Amendments. Since amendments are not self executing, a number of Civil Rights Acts were passed between 1866 and 1875 clarifying the intent of these amendments. However, these constitutional and legislative measures designed to protect the right to vote, to serve on juries, the right to contract and to sue, and the right to equal treatment in places of public accommodation were foiled by Black Codes, Grandfather Clauses, white primaries, literacy tests, and most pointedly by Supreme Court interpretations limiting the scope of the laws. The culminating decision was *Plessy v. Ferguson*, handed down in 1896, declaring that the Fourteenth Amendment's Equal Protection of the Laws Clause sanctioned separate but equal treatment of the races.

Women, like African Americans, were discriminated against by legal means. Two important cases took place at this time, one a state case and the other a Supreme Court decision, which set back the cause of womans' rights. The trial of Susan B. Anthony on June 18, 1873 has to be read to be believed. It deserves a place in every history text, as does the Supreme Court's *Bradwell v. Illinois* decision, also decided that year. In ruling that this judge's wife could not be admitted to the bar to practice law, the Justices used language which perpetuated the stereotype that a woman's place was in the home.

Discrimination and violence during these years did not draw a color line. Chinese were excluded in 1882 from coming to this country, and decades of conflict with Native Americans led to a series of wars, culminating in 1890 in the Battle of Wounded Knee.

* * *

Although police forces were being organized at this time and the courts were functioning, the Ku Klux Klan, "Judge Lynch," and vigilante justice prevailed in parts of the country. The trials resulting from the 1886 Haymarket Riot give us some sense of what results when due process is confronted by public hysteria. The Supreme Court's affirmation of the contempt citation of Eugene Debs is indicative of judicial reaction to the role of labor at that time.

The Square Deal, the New Freedom, and the New Deal: 1900-1945

Theodore Roosevelt, Woodrow Wilson, and Franklin Delano Roosevelt left their mark on American history in memorable slogans. Their use of political power transformed the times in which they lived and their programs established institutions and policies which still serve as sounding boards for contemporary issues. The spirit of the Progressive Movement flourished during the first two decades and was revived in response to the challenges of the Great Depression.

Proposals to return political power to the people led to the Seventeenth and Nineteenth Amendments as well as local measures, such as the initiative, referendum, and recall. This period also saw experiments with city manager and mayor-city council forms of municipal government.

The dominant theme during the early years was opposition to corporate bigness and monopoly and a marked concern for working people. The former resulted in trust-busting and such legislation as the Clayton Antitrust Act and the Federal Trade Commission Act, while the latter took the form of social legislation—minimum wages, maximum hours, and child labor laws.

This period marked a series of confrontations between the states and Congress, on one side, and the Supreme Court, on the other. Reading into the Constitution the theory of laissez-faire, the Court invoked the measuring rod of substantive due process of law. Using the anvil of the Fourteenth Amendment's Due Process of Law Clause, the Court struck down social legislation on the ground that it was capricious, arbitrary, and unreasonable. For example, when the Court invalidated a New York State law limiting employment in bakeries to 10 hours a day and 60 hours a week, it reasoned that the legislation interfered with the "liberty of contract" of employer and employee. A distinguished constitutional authority commented that the Justices in that case had converted "liberty" into freedom of contract, "property" into business conduct in pursuit of profit, and "due process of law" into anything which a majority of the Court regarded as reasonable. In his oft-quoted dissenting opinion, Justice Oliver Wendell Holmes, Jr. reminded his colleagues that "A Constitution is not intended to embody a particular economic theory, whether of paternalism. . .or of laissez-faire."

Three years after the *Lochner* decision in 1905, the Court upheld Oregon's law prohibiting the employment of women in factories for more than 10 hours a day. The Brandeis Brief, utilizing an unprecedented array of statistical and sociological data persuaded the Justices to make an exception in the case of women, a result which has been condemned today by feminists who see in this a dangerous precedent in the quest for equality.

Judicial and legislative victories marked the early years of this period. The Court dissolved the tobacco and oil trusts, while consumer legislation in meats, foods, and drugs set the precedent for protective standards. The New Deal brought with it an extensive arsenal of experimental legislation, and the Court's unfavorable response led to FDR's Court Reform Plan with its firestorm of opposition.

* * *

It was during this period that the First Amendment faced its most serious challenge since the Alien and Sedition Acts of 1798. Congressional legislation—the Espionage Act of 1917 and the Sedition Act of 1918—and state laws circumscribed freedom of expression leading to a number of important Supreme Court rulings. In *Schenck v. United States* (1919), Justice Oliver Wendell Holmes, Jr. expounded his Clear and Present Danger Rule only to discover to his dismay that he had to dissent when his colleagues applied it in the *Abrams* case the very same year.

Although the High Court upheld the convictions, an interesting development at the time in the case of *Gitlow v. New York* (1925) seemed at first like a footnote in the law. The Justices ruled that the idea of liberty as freedom of expression applied to the states under the Due Process of Law Clause of the Fourteenth Amendment. This turned out to be the opening wedge in the incorporation doctrine under which many of the rights in the Bill of Rights were nationalized. As a result, the Supreme Court has created a set of national norms relating to liberty and justice (due process of law) binding on the national government and the states.

In 1925, the ideas of liberty and justice played important roles in the drama of the Scopes trial in Tennessee. There, religious fundamentalism and the evolutionary theory of Darwin met head on in a riveting case in which the protagonists, Clarence Darrow and William Jennings Bryan, transformed a local case into national entertainment. The issues presented dramatically in the small town of Dayton continue to simmer to this very day.

The Bettmann Archive

Opposing counsel Clarence Darrow and William Jennings Bryan at the Scopes trial.

* * *

In the arena of equality during this period, the Nineteenth Amendment was ratified in 1920, granting suffrage to women and, four year later, citizenship was extended to Native Americans. But people of color continued to fare poorly when local or national customs were confronted with constitutional issues relating to due process of law or equality.

A case in point is the trials of the Scottsboro Nine, a group of nine young African American men ranging in age from 12 to 19 who were accused of raping two white girls. What began in 1931 continued for nearly two decades, until 1950 to be exact, when the matter was put to rest. Only the intervention of the United States Supreme Court and public outrage throughout the country saved the defendants from lynching and the death sentence.

While the Scottsboro case involved nine young men, the Japanese internment policy during World War II involved 125,000 men, women, and children. Justified by the government as necessary to counter sabotage, espionage, and other "fifth column activities," this tragic episode has troubled the collective conscience of the American people to the point where compensation has been paid out to the survivors. In its three decisions in this area, the Supreme Court sided with military necessity in two of the rulings; in the third, the Justices concluded that American citizens of Japanese ancestry whose loyalty has been investigated and confirmed could not be detained against their will.

The Crisis in Constitutionalism: 1945-1993

The turn of the kaleidoscope brings us to the present scene: a half-century of historic triumphs in civil liberties (liberty and justice), civil rights (equality), and reapportionment ("one person, one vote") and national tragedies in the abuse of political power. If any theme seems to dominate this period, it is the periodic disregard of the principle of constitutionalism as a way of political life. Actions by presidents and their aides, as well as by members of Congress and state officials, seem to be based on the assumption that they are not subject to their oaths of office and the Constitution and the laws of the land.

Invasions of the Bay of Pigs, Grenada, and Panama directed by recent presidents have chipped away at the constitutional power of the Congress to declare war. Although U.S. involvement in the Korean conflict can be traced to an act of the United Nations Security Council, of which we were a member, the Vietnam War was pursued by the presidents and members of both parties with the Gulf of Tonkin Resolution as a ploy to justify military action.

The Watergate and the Iran-Contra episodes represent the most serious violations of the principle of constitutionalism since the Grant and Harding scandals. President Nixon was designated by the Watergate grand jury as an "unindicted coconspirator" and forced to resign, while some of his aides went to prison. He was pardoned by President Ford for any crimes he committed or may have committed. The Iran-Contra intrigue, which took place during the Reagan administration, involved foreign countries in a scenario of arms and hostages, as well as military officers and presidential aides. Congressional hearings and criminal trials led to a number of convictions. The independent prosecutor complained of official intransigence as a hindrance in bringing those who were accused to trial and in disclosing the nature and extent of incriminating evidence. As in Watergate, President Bush pardoned Caspar Weinberger, former Secretary of Defense, who had been indicted, and several others who had been convicted. Amid the cacophony of charges and counter-charges—a witchhunt criminalizing policy differences and a conspiracy to interfere with due process of law—there is evident a gradual erosion of public confidence in our constitutional system.

What is especially disconcerting about Watergate and Iran-Contra is the defense of some of the accused who argued that they were obeying the orders of their superiors or were setting the stage for "plausible deniability." Like Lt. Calley's defense in the My Lai massacre, the result may very well be the undermining of constitutionalism by crimes of obedience—the position that there are some government officials who are above the law.

* * *

During this period, the idea of liberty had its setbacks and its victories. World War II was barely over when Cold War tensions and suspicions led to the targeting of the Communist Party and communist sympathizers as the most serious threat to national security. The response was Congressional legislation, such as the Internal Security Act of 1950, state loyalty laws, and Congressional and state inquiries into beliefs and associations. Senator Joseph McCarthy dominated the early 1950s with his inquisitorial hearings, charges of guilt by association, and a cavalier disregard of the letter and spirit of constitutionalism. What followed has been described as "a chilling effect on the First Amendment" and "a pall of orthodoxy."

While this was going on, two sensational trials attracted world-wide attention. In 1949, the nine-month trial of 11 communist leaders for violating the Smith Act of 1940 by conspiring to teach and advocate the overthrow of the government by force or violence ended in their conviction, with the Supreme Court affirming the verdict by a 6-2 vote. Shortly thereafter, the espionage trial of Ethel and Julius Rosenberg made headlines. Their death sentence inspired a worldwide protest, including such notables as Pope Pius XII and Albert Einstein, but failed to stop their execution.

As the McCarthy period was drawing to a close, the Warren Court (1953-69) began its interpretation of First Amendment freedoms. In cases involving separation of church and state, the Court declared unconstitutional required prayers and Bible reading in public schools; in conscientious objector cases, it eased the scope of exemptions; in the *Tinker* case, it supported the symbolic speech of students who did not disrupt the school environment; and it expanded freedom of the press to criticize public officials in defamation actions (shades of John Peter Zenger!). These and other cases have established precedents that the Burger and Rehnquist Courts have had to wrestle with.

* * *

Both in the area of liberty and justice (Amendments Four, Five, Six, and Eight), the Warren Court initiated constitutional revolutions. What the Justices did was to continue on a large scale the nationalization of the Bill of Rights by incorporating a number of its provisions within the Due Process of Law Clause of the Fourteenth Amendment. By doing this, the Court set up a number of national norms which applied to all persons in all the states.

The landmark rulings of the Warren Court in criminal justice are now widely known and recognized. The *Gideon* case extended the right to counsel to the indigent; *Miranda* condemned coerced confessions; *Mapp* applied the exclusionary rule to the states; and *Gault* expanded the rights of juveniles in delinquency proceedings. In various shapes and forms, these precedents have survived.

* * *

Confronting Gunnar Myrdal's *An American Dilemma*, the Warren Court initiated a revolution in civil rights by striking a series of constitutional blows against the wall of segregation. Invoking the Fourteenth Amendment's Equal Protection of the Laws Clause in *Brown v. Board of Education* and the Due Process of Law Clause of the Fifth Amendment in *Bolling v. Sharpe*, the Court in 1954-1955 unan-

For Further Reading

The following books helped shape my thinking as I prepared this article. I acknowledge their contributions and commend them to those seeking additional background material.

The national and a number of the state LRE projects have made distinctive contributions to this field. Two excellent publications are *Law in American History* by James G. Lengel and Gerald A. Danzer (Scott Foresman, 1983) and *Law in U.S. History* by Melinda R. Smith, Kenneth Rodriguez, and Mary Louise Williams (Social Science Education Consortium, 1983).

There are alternative approaches to teaching this topic. For example, one could focus on the top 20 cases, laws, executive acts, lawmakers, contributors to justice, equality, and liberty. Those interested in the top 20 cases will find two volumes especially helpful: Jethro K. Lieberman's *Milestones: 200 Years of American Law: Milestones in Our Legal History* (West Publishing, 1976) and Lee Arbetman and Richard L. Roe's *Great Trials in American History* (West Publishing, 1985).

Lawrence M. Friedman's *A History of American Law* (2nd ed., Simon and Schuster, 1985) is probably one of the best sources in this field. One will find here some of the topics which deserve to be included, such as the role of lawyers and the bar.

There are many books dealing with constitutionalism. One of my favorites is an "oldie": Arthur E. Sutherland's *Constitutionalism: Origin and Evolution of its Fundamental Ideas* (Blaisdell Publishing Co., 1965). An earlier classic is Clinton Rossiter's *Seedtime of the Republic* (Harcourt, Brace, 1953).

Two excellent sources for the colonial period are *Law and Authority in Early Massachusetts* by George Lee Haskins (University Press, 1960) and the essays in Leonard W. Levy and Dennis J. Mahoney's (eds.) *The Framing and Ratification of the Constitution* (Macmillan, 1987).

Two important contributions to this field are James Willard Hurst's *Law and the Conditions of Freedom in the Nineteenth-Century United States* (University of Wisconsin Press, 1964) and Stanley I. Kutler's *Privilege and Creative Destruction: The Charles River Bridge Case* (Johns Hopkins Press, 1971). These volumes complement each other in explaining the burst of economic energy, the creation of vested privilege, and the reaction of the state through the uses of the law.

The darker side of the law is developed in Frank Browning and John Gerassi's *The American Way of Crime: From Salem to Watergate* (P.T. Putnam's Sons, 1980) and in *Crimes of Obedience* by Herbert C. Kelman and V. Lee Hamilton (Yale University Press, 1989).

There are many books dealing with inequality: Albie Sachs and Joan Hoff Wilson's *Sexism and the Law: Male Beliefs and Legal Bias* (The Free Press, 1978); Dee Brown's *Bury My Heart at Wounded Knee* (Bantam, 1971); Charles F. Wilkinson's *American Indians, Time, and the Law* (Yale University Press, 1987); *Simple Justice* by Richard Kluger (Random House, 1975); and *Justice at War: The Story of the Japanese Americans Internment Cases* by Peter Irons (Oxford, 1983).

There are many important books dealing with the idea of liberty. Two which deserve our attention are Thomas L. Emerson's *The System of Freedom of Expression* (Random House, 1970) and Leonard W. Levy's *Emergence of a Free Press* (Oxford, 1985).

One of the best book on the nature of power is Adolf Berle's *Power* (Harcourt, Brace and World, 1969), a survey of the role of power in human affairs. *Liberty, Property, and the Law: Constitutional Interpretation before the New Deal*, edited by Ellen Frankel Paul and Howard Dickman (State University of New York Press, 1989) is an excellent collection of essays exploring the idea of property. Richard Epstein's *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press, 1985) is the authoritative work in its field. Both books should be read together, since the essays support and oppose the reasoning in the takings controversy.

The economic "wilding" of the past fifteen years has been chronicled by Donald L. Barlett and James B. Steele, the Pulitzer-prize winning reporters of the *Philadelphia Inquirer*, in their *America: What Went Wrong?* (Andrews and McMeel, 1992) and in Charles Derber's *Money, Murder, and the American Dream: Wilding from Wall Street to Main Street* (Faber and Faber, 1992).

imously agreed that segregated education in the states and in the District of Columbia was unconstitutional. What followed was a steady stream of opinions striking down racial discrimination in public accommodations, housing, and voting. By sustaining the constitutionality of the landmark civil rights legislation of the Congress (Civil Rights Acts of 1964, 1965, and 1968), the Court joined the Congress in rectifying the record of history dating back to the drafting of the Constitution.

The reaction to the *Brown* case was peaceful protest and violent action. Southern representatives and senators, as well as many of the Southern

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states, invoked states' rights and devised ways of circumventing federal law. One county even went so far as to close its schools rather than desegregate. However, the constitutional roadblock to desegregation had been demolished and the road to equality had been opened to those who had been excluded. Controversies involving affirmative action and quotas and guidelines have complicated the journey toward equality.

Three important equality amendments were added to the Constitution during this period, while the Equal Rights Amendment was voted down. The Twenty-third Amendment gave citizens in the District of Columbia the right to vote for presidential and vice presidential electors; the Twenty-fourth abolished the poll tax in federal elections; and the Twenty-fifth enfranchised 18-year olds.

Despite the defeat of the Equal Rights Amendment, feminists have made impressive strides in politics, in the professions, and in the workplace. Native Americans have initiated court cases relating to past treaties, their ownership of land, and the status of Indian tribes as permanent governments within the federal system.

When Chief Justice Warren was about to retire, he was asked which of the opinions of his Court did he consider the most important. He surprised his questioner by not citing *Brown v. Board of Education*, but rather *Baker v. Carr*, the case which initiated the apportionment revolution and evolved into the one person, one vote principle.

* * *

As in periods past, the idea of property weaves its way through the fabric of society. Property is power in the economic, social, and political spheres. The more property one possesses, the greater the options available for the pursuit of happiness.

The deregulation policies in recent years in the interest of laissez-faire and free enterprise have disclosed that Adam Smith's invisible hand can be far more grasping and greedy than beneficial and friendly. The "junk bond" orgy and airline fare wars have created havoc for stockholders and communities. A number of investigative reporters—the best of whom rival those of the Progressive Era—have disclosed that the rulemakers in Washington have too often been the allies of the dealmakers in business. Add to this the savings and loan scandal and corruption in some of the government agencies, such as Housing and Urban Development, and the stage is set for regulatory legislation. This is reminiscent of the post-Civil War period with its economic wilding and economic reform.

Three developments during this period warrant our attention. In 1952, President Truman seized the steel mills to head off a threatened nationwide strike. As this action took place during the Korean conflict, the president justified his act by citing his powers as Chief Executive and Commander-in-Chief of the Armed Forces. The case of *Youngstown Steel and Tube Co. v. Sawyer* has become a classic exposition of the power of the president over private property. In seven separate opinions covering 131 pages, the 6-3 decision lectured the president on the limits of his powers. The seizure was adjudged to be illegal on the ground that the Congress had jurisdiction over the disposition of private property in this case.

The second development is the emergence of the "takings" school of law. Basing its position on the Eminent Domain clause of the Fifth Amendment, as well as those in state constitutions, these scholars argue that this provision is designed to protect private property against government "takings" which affect the value of the owner's land or business. This movement has serious implications for zoning and environmental legislation.

During this period, a new form of property has emerged, arising, in part, from New Deal legislation of the 1930s. Designated as entitlements, it includes farm subsidies, Social Security, Medicare, pensions, unemployment insurance, and welfare payments, among others. These claims—some of them, like Social Security and Medicare are based on contributions by recipients—are regarded as property rights and justifiable claims on the government. As we approach the twenty-first century, this issue will require the wisdom of a Solomon to resolve to the satisfaction of an aging population.

There are many other issues and cases that deserve examination. For example, the *Pentagon Papers Case*, (1971), which struck a blow against prior censorship; *United States v. Nixon*, which in 1974 ruled that executive privilege had to give way to criminal justice; and *Roe v. Wade* (1973) with its penumbras in the ideas of liberty and justice.

Conclusion

In an article this ambitious in scope, there are bound to be regrettable omissions. Limitations of space forced skipping over such important topics as New Deal legislation, which is mentioned in passing, and new challenges such as the right to die and genetic engineering. However, I believe that our central point has been underscored: In teaching United States History, the study of the law cannot be avoided. It can be taught well or badly, but it cannot be omitted. What law-related education has contributed to quality civic education is its uncovering of the role of law in our lives as individuals and in our roles as citizens.

One last thought. I am sure that James Madison would not object to my paraphrasing of his famous quotation in Federalist No. 51 because it is all in a good cause.

But what is law itself but the greatest of all reflections on human nature. If human beings were angels, now law would be necessary. If angels were to govern human beings, neither internal nor external controls would be necessary. In framing a legal system which is to be administered by human beings over human beings, the great difficulty lies in this: you must first enable the lawmakers to carry out their laws; and in the next place, oblige the lawmakers to obey the laws.

Teaching Strategy

Back to the Future of the Bill of Rights

Emil Zullo

Objective

To introduce students to the sources of the federal Bill of Rights.

Background

In 1787, each of the original thirteen states had to decide whether to ratify the Constitution. The process pitted two forces against one another: the Federalists, who supported the Constitution as proposed, and the Anti-Federalists, who opposed ratifying the document unless provisions were added to guarantee specific rights to individuals.

Along with notification of their acceptance of the Constitution, several states sent a list of suggested changes. These states indicated that they would have trouble supporting the Constitution in the future unless their suggestions were put into a Bill of Rights. The more than two-hundred suggestions offered by these states contained (after taking into account some duplication of ideas and words) approximately one hundred ideas. A Virginia printer, Augustine Davis, compiled them into a booklet entitled "The Ratifications of the New Foederal Constitution together with the amendments proposed by the several states."

James Madison, a major architect of the Constitution, was initially opposed to any Bill of Rights. He believed all necessary rights could be found in the existing document, and that many of the states had their own bills of rights with which the new federal government could not interfere.

During the time between the ratification conventions of the various states and the meeting of the first federal Congress, however, Mr. Madison changed his mind. The voters in the congressional district for which he was a candidate felt strongly about a need for a federal Bill of Rights. His friend Thomas Jefferson also helped persuade him of the value of such a document. Armed with research from Augustine Davis' booklet, in August of 1789 Mr. Madison submitted to the first federal Congress a proposal for a federal Bill of Rights.

Materials Needed

1. Constitutional amendment suggestions from Massachusetts, New York, North Carolina and Virginia (reprinted here with permission from "The Contexts of the Bill of Rights"; Stephen L. Schechter and Richard Bernstein, eds.; The New York State Commission on the Bicentennial of the Constitution, 1990).
2. A copy of the present United States Constitution, as amended.

Time Needed

Two class periods.

Procedures

On the first day, students should:

- familiarize themselves with the materials listed above;
- respond in writing to Handout Questions 1 and 2; and
- be assigned Handout Question 3 as homework.

On the second day, students should:

- review their in-class written work from the previous day;
- help their classmates draw up a Bill of Rights (using the lists they were assigned for homework) and provide a rationale for each item.
- discuss Debriefing Questions 1-3;
- be given the option of earning extra credit by writing an essay or research paper in response to Debriefing Question 4.

Handout Questions

1. Find instances where a state's suggestion became part of the federal Bill of Rights. Which state offered the suggestion? Which constitutional amendment eventually incorporated it?
2. Find any wording in the states' suggestions that became part of future constitutional amendments beyond the Bill of Rights (amendments 1-10) and identify that future amendment by number (11-27).
3. Assume you are James Madison preparing to present your list of rights to the first federal Congress. Assume also that you are blessed with knowledge of the more than two hundred years of American history that will follow the Bill of Rights' ratification. Keenly aware of the many problems our nation faces (crime, discrimination, pollution, etc.), select the suggestions you would want to be part of your new Bill of Rights. Explain how each of the rights you select will assist the modern American citizen as we approach the twenty-first century.

Emil Zullo is a law instructor and Director of Project C.A.P.A.B.L.E. for the Kingston Consolidated Schools in Kingston, New York.

Student Handout

Suggested Constitutional Amendments

MASSACHUSETTS

First, That it be explicitly declared, that all powers not expressly delegated by the aforesaid Constitution, are reserved to the several states; to be by them exercised.

Secondly, There shall be one representative to every thirty thousand persons, according to the census mentioned in the Constitution, until the whole number of representatives amount to 200.

Thirdly, That Congress do not exercise the powers vested in them by the 4th sect. of 1st art. but in cases when a state neglect or refuse to make regulations therein mentioned, or shall make regulations subversive of the rights of the people, to a free and equal representation in Congress, agreeable to the Constitution.

Fourthly, That Congress do not lay direct taxes but when the monies arising from the import and excise are insufficient for the public exigencies; nor then, until Congress shall have first made a requisition upon the States, to assess, levy, and pay their respective proportions of such requisition, agreeably to the census fixed in the said Constitution, in such way and manner as the legislature of the state shall think best—and in such case, if any state shall neglect or refuse to pay its proportion, pursuant to such requisition, then Congress may assess and levy such state's proportion, together with interest thereon, at the rate of six per cent, per annum, from the time of payment prescribed in such requisition.

Fifthly, That Congress erect no company of merchants, with exclusive advantages of commerce.

Sixthly, That no person shall be tried for any crime by which he may incur an infamous punishment, or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces.

Seventhly, The Supreme Judicial Foederal Court shall have no jurisdiction of causes between Citizens of different states, unless the matter in dispute, whether it concerns reality or personality, be of the value of 3000 dollars at the least; nor shall the Foederal judicial powers extend to any actions between citizens of different states, where the matter in dispute, whether it concerns the reality or personality, is not of the value of 1500 dollars at the least.

Eighthly, In civil actions, between citizens of different states, every issue of fact arising in actions at common law shall be tried by a jury, if the parties, or either of them, request it.

Ninthly, Congress shall, at no time, consent, that any person, holding an office of trust or profit, under the United States, shall accept of a title of nobility, or any other title or office, from any king, prince, or foreign state.

NEW YORK

That the enjoyment of life, liberty, and the pursuit of happiness are essential rights which every government ought to respect and preserve.

That the powers of government may be reassumed by the people, whensoever it shall become necessary to their happiness; that every power, jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments, to whom they may have granted the same; and that those clauses in the said Constitution, which declare that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution; but such clauses are to be construed either as exceptions to certain specified powers, or as inserted merely for greater caution.

That the people have an equal, natural and unalienable right, freely and peaceably to exercise their religion according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference of others.

That the people have a right to keep and bear arms; that a well regulated militia, including the body of the people capable of bearing arms, is the proper, natural, and safe defence of a free state.

That the militia should not be subject to martial law except in time of war, rebellion or insurrection.

That standing armies in time of peace are dangerous to liberty, and ought not to be kept up, except in cases of necessity, and that at all times the military should be under strict subordination to the civil power.

That there should be once in four years, an election of the President and Vice-President, so that no officer who may be appointed by the Congress to act as President, in case of the removal, death, resignation or inability of the President and Vice-President, can in any case continue to act beyond the termination of the period for which the last President and Vice-President were elected.

That nothing contained in the said Constitution, is to be construed to prevent the legislature of any state from passing laws at its discretion, from time to time, to divide such state into convenient districts, and to apportion its representatives to, and among such districts.

That the prohibition contained in the said Constitution, against ex post facto laws, extends only to laws concerning crimes.

That all appeals in causes, determinable according to the course of the common law, ought to be by writ of error, and not otherwise.

That the judicial power of the United States, in cases in which a State may be a party, does not extend to criminal prosecutions, or to authorise any suit, by any person against a State.

NORTH CAROLINA

8th. That in all capital and criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence and be allowed counsel in his favor, and to a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty (except in the government of the land and naval forces) nor can he be compelled to give evidence against himself.

9th. That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, privileges or franchices, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the law of the land.

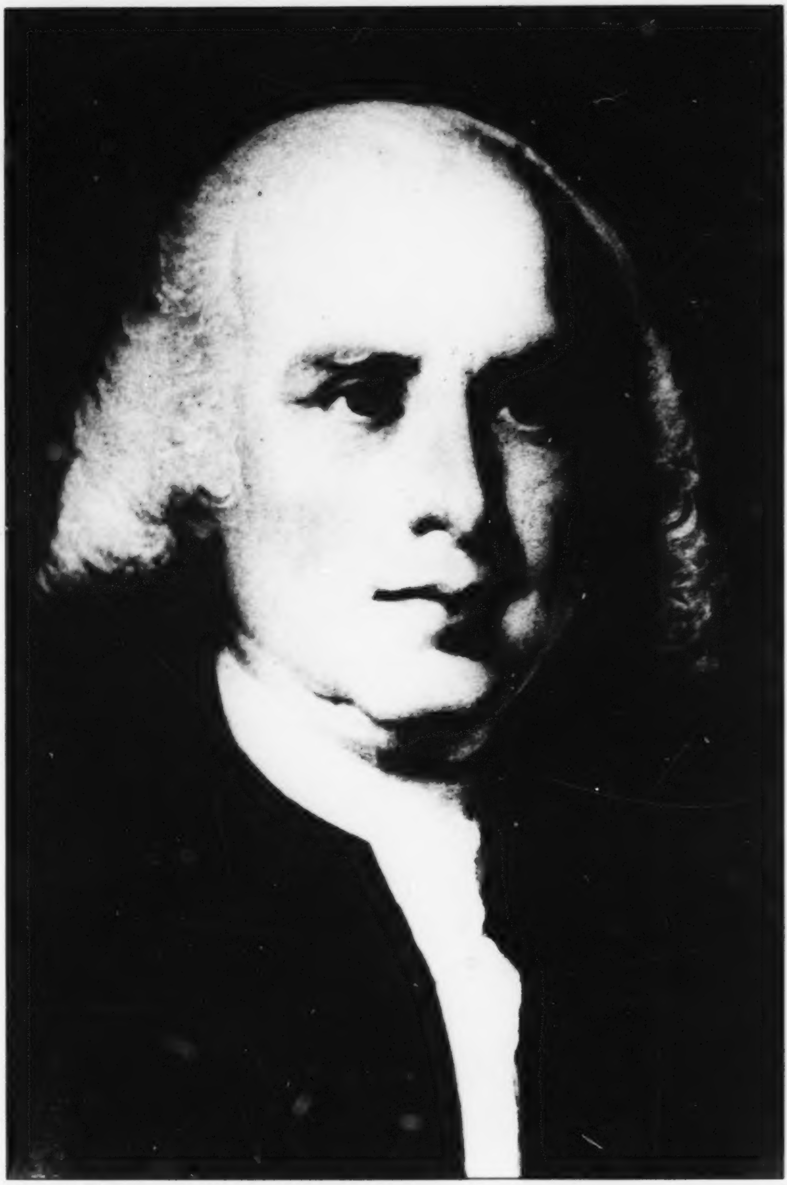
10th. That every freeman restrained of his liberty is entitled to a remedy to enquire into the lawfulness thereof; and to remove the same, if unlawful, and that such remedy ought not to be denied nor delayed.

11th. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and ought to remain sacred and inviolable.

12th. That every freeman ought to find a certain remedy by recourse to the law for all injuries and wrongs he may receive in his person, property, or character. He ought to obtain right and justice freely without fale, completely and without denial, promptly and without delay, and that all establishments, or regulations contravening these are oppressive and unjust.

13th. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

14th. That every freeman has a right to be secure from all unreasonable searches, and seizures of his person, his papers, and property; all warrants therefore to search suspected places, or seize any freeman, his papers or property, without information upon oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive, and all general warrants to search suspected places, or to apprehend any suspected person without specially naming or describing the place or person, are dangerous and ought not to be granted.



The Bettmann Archive

James Madison

15th. That the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives; and that every freeman has a right to petition or apply to the Legislature for redress of grievances.

16th. That the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated.

VIRGINIA

9th. That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, privileges or franchises, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the law of the land.

10th. That every freeman restrained of his liberty is entitled to a remedy to enquire into the lawfulness thereof, and to remove the same, if unlawful, and that such remedy ought not to be denied nor delayed.

11th. That in controversies respecting property, and in suits between man and man, the ancient trial by jury, is one of the greatest securities to the rights of the people, and ought to remain sacred and inviolable.

12th. That every freeman ought to find a certain remedy by recourse to the laws for all injuries and wrongs he may receive in his person, property, or character. He ought to obtain right and justice freely without fale, completely and without denial, promptly and without delay, and that all establishments, or regulations contravening these rights, are oppressive and unjust.

13th. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

14th. That every freeman has a right to be secure from all unreasonable searches of his person, his papers, and property; all warrants therefore to search suspected places, or seize any freeman, his papers or property, without information upon oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive, and all general warrants to search suspected places, or to apprehend any suspected person without specially naming or describing the place or person, are dangerous and ought not to be granted.

15th. That the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives; and that every freeman has a right to petition the Legislature for redress of grievances.

16th. That the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated.

17th. That the people have a right to keep and bear arms, that a well regulated militia composed of the body of the people trained to arms, is the proper, natural and safe defence of a free state. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that in all cases, the military should be under strict subordination to and governed by the civil power.

The Original Colonies

NEW YORK
NEW HAMPSHIRE
MASSACHUSETTS
PENNSYLVANIA
RHODE ISLAND
CONNECTICUT
NEW JERSEY
DELAWARE
MARYLAND
VIRGINIA
NORTH CAROLINA
SOUTH CAROLINA
GEORGIA

Debriefing Questions

1. What similarities do you see among the states' suggested changes? What differences?
2. After reviewing all of the states' suggestions, what rights and protections are especially emphasized? Why do you think the states believed these rights were so important?
3. Do any of the states' suggested amendments seem unnecessary or old-fashioned to you today? Why?
4. What do you think a "right" is? Who has them? Where do they come from? Do you think they have changed from the days when the Bill of Rights was added to the Constitution in 1791?

Law and U.S. History

Strategies for Teaching Law in American History

Peter Knapp

The study of American history provides fertile ground for law-related education. To know about and understand the unfolding story of American history is to know about and understand the law, its evolution, influence, and potential. Since the mid-1960s, focused and thoughtful efforts have been made in social studies to infuse meaningful law-related education into the study of American history. Teachers, professors, curriculum writers, and publishers have worked to create lessons and materials that help students better understand the law and its role in our history. Teacher-training institutes, curriculum efforts, regional, state and national projects, conferences and workshops, special publications (such as this one), and student competitions have all been developed to assist in furthering law-related education. At first identified as an "educational fad," now recognized by educators and historians as a legitimate and significant focus of interest, law-related education can be found in many American history classrooms throughout the nation. And rightly so! To study American history without attention to the role and significance of law is to commit an intellectual disservice to our students.

Because many educators trained in the sixties, seventies, and early eighties had little specific training or background in law as it relates to history, the priority and emphasis of much law-related education early on was teacher training. Methodology as well as substantive law was given priority at teacher workshops and institutes around the country. Fortunately, good social studies teaching strategies were easily adapted to law-focused content. American history classes became popular places for piloting new materials and approaches. Teachers found law-related education themes and methods to be highly motivating with students and very successful. What follows is a brief listing of and commentary on some of the more prevalent strategies for using law to teach American history. The emphasis is on instruction at the secondary level (grades 7-12), although variations on and adaptations of these strategies have been successfully used at lower grade levels.

Case Study

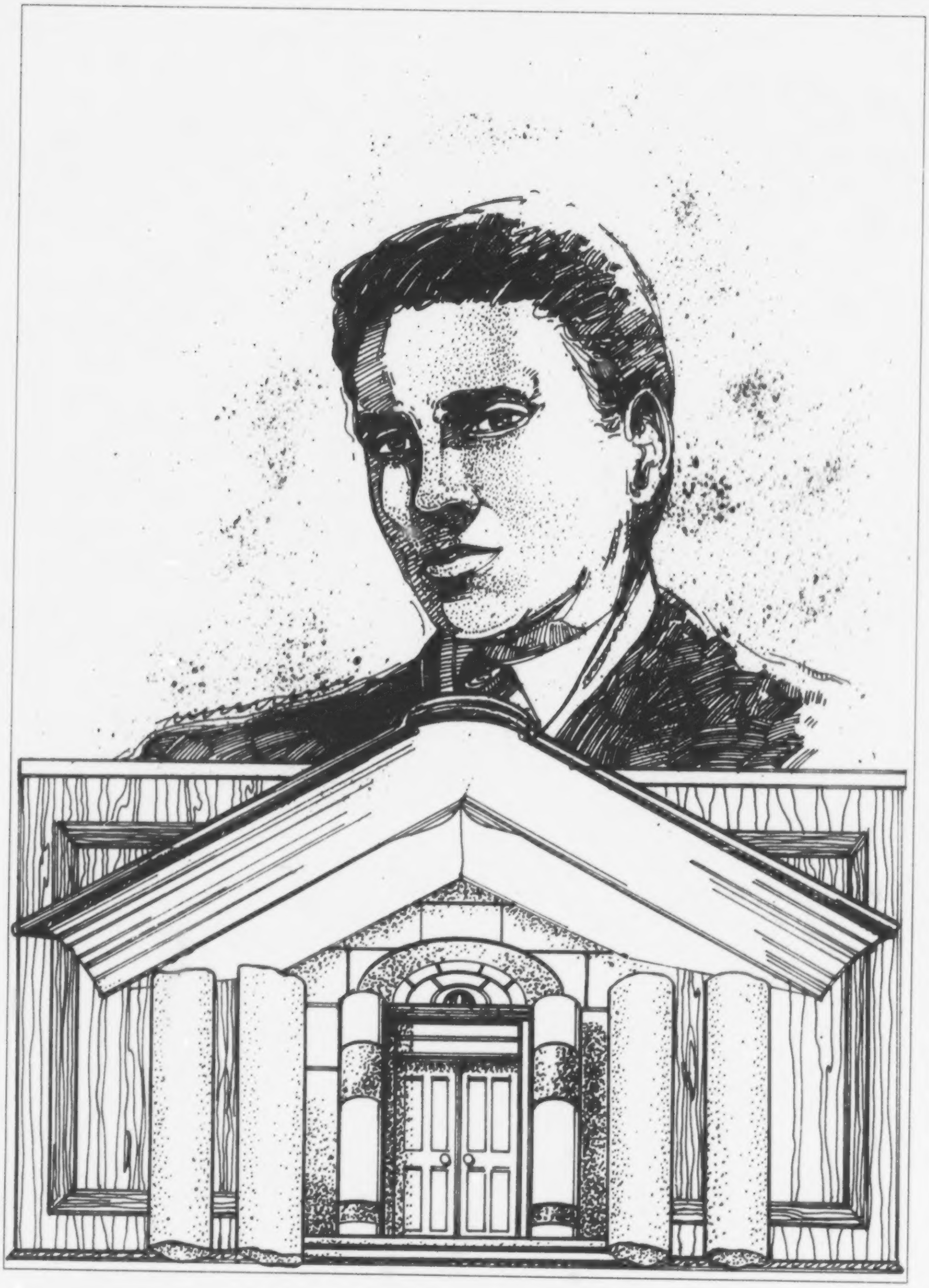
Probably the most widely used and adapted law-related education method used in American history classes today is the case study. This approach to instruction was first developed to help law students obtain the necessary skills of "initiative, independent analysis, balanced reasoning, critical judgement, and articulate communication in addition to exposing them to the fundamentals of legal analysis and the legal process" (Gallagher).

Professor Christopher Langdell first introduced this method of instruction in 1870 at Harvard Law School. Langdell asked his students to read and analyze cases and to actually participate in the teaching process as problem solvers rather than as passive recipients of lectures (Gerlach). By asking students to simulate the step-by-step mental practice of lawyers, the case study method also offers insight into the historical and dynamic development of law. It has proven to be a provocative and motivating factor for many students regarding the study of history and law.

The key elements of a legal case study include the following:

1. *title of case*: legal citation;
2. *facts*: a summary description of the events which took place that raised the legal question(s);
3. *issues*: the legal problem(s) which arise as a result of the factual situation posed as questions;
4. *arguments*: the different reasons presented by the two adversaries for resolving the issues in favor of the respective sides;
5. *reasoning*: what factors the court takes into account in reaching its decision in the issue(s); and
6. *decision*: how the court answers the issues the conclusion it comes to as a result of the reasoning (Gerlach).

Peter Knapp is a school administrator and an English and Social Studies teacher for the Brighton Schools in western New York. He is also the director of a regional law-related education project in the Rochester, New York area.



Ruben Ramos

A creative teacher using the above-outlined material from a case can take it in many directions. These might include a straightforward "law school type recitation lesson," a small group/large group format discussion, a research exercise, a dramatized role play and/or moot court simulation, or written legal brief activity, etc. Historical cases such as the Peter Zenger trial (1735), the Korematsu case (1944) or the *Tinker v. Des Moines* case (1969) provide opportunities to review important legal issues in a historical context. Likewise, current issues (history in the making) related to privacy, self-expression, and separation of church and state (to name a few) can be thoughtfully examined via the case study approach. Encouraging students to gather data, identify issues, think analytically, view alternative viewpoints, and defend positions all contribute to important learning in American history. In addition, case studies serve to enrich and personalize the study of history. (For a more detailed description of how to use the case study approach step-by-step with several variations, see Gerlach or Gallagher.)

Role playing

Role playing is one of the most popular and versatile student-centered teaching strategies available to the American history teacher. It lends itself easily to being used in a law-focused activity where there is the desire to promote participation, problem-solving, cooperative learning, creativity, and consideration of alternative viewpoints. This strategy employs student participation, group effort, and communication skills. Key elements in role-playing include:

1. planning, preparing, rehearsing;
2. actual role play enactment; and
3. debriefing, analysis, and discussion.

For role-play success, careful attention must be paid to each of these elements. Inappropriate planning and preparation time or insufficient debriefing will rob this activity of its rich potential to help students better understand a legal issue or a historical situation.

Because so many legal concepts

have their roots in historical cases, it is possible for an American history teacher to use role playing in numerous places throughout the curriculum. The Salem witchcraft trials provide an opportunity to deal with due process, evidence, courtroom procedures and the right to a fair trial. The relocation of Japanese-Americans during World War II provides an opportunity to deal with the suspension of civil rights and liberties and the issues related to the power of Congress and the president during wartime. These are but two examples of where such role-playing can be employed. Teachers can create their own role-play scenarios or use commercially prepared ones from available from a variety of sources.

Mock Trials

Mock trials are a variation on the role play strategy and have become a favorite of many students and teachers. They offer a more focused and sophisticated activity to teach about the law and history. Mock trials are educationally beneficial because they:

1. emphasize concepts of justice and due process;
2. help students understand the significance of procedures and practices in our courtrooms;
3. identify the roles and responsibilities of the various players in the trial process;
4. provide opportunities for skill development in organizing, planning and presenting ideas on paper and orally; and
5. encourage cooperative efforts in students' work in preparing for and presentation of the trial.

As in a role-play, mock trials require attention to:

1. planning, preparing, rehearsing;
2. actual enactment; and
3. debriefing, analysis, discussion.

The amount of time required for a mock trial can vary significantly depending upon the age, ability level, kind of case, and goals for the activity. It is safe to say that this teaching strategy is one of the most popular ones with students. It is an integrated teaching method that asks students to apply skills and knowledge on a variety of levels. It is "action oriented" and allows for creative and cooperative efforts.

For American history teachers, mock trials can be used almost anywhere in the curriculum. Trials can be based upon actual historical trials such as the trial of Dr. Samuel Mudd (1865), the Scopes trial (1923) or the *Tinker v. Des Moines* case (1969).

Another option is for the teacher to create a mock trial around particular historical issues. Such trials serve to illuminate the issues and provide a forum for debate, discussion, and reflection. Such trial topics might include:

John D. Rockefeller—Industrial Giant or Robber Baron?
Harry S. Truman—Should he have dropped the bomb?
Richard M. Nixon—Should he have been pardoned?

In such cases, students are assigned sides to the question as well as roles (the accused, supporting witnesses, etc.). They are given time to research the facts and issues. Eventually, a trial is conducted where the facts and issues are put forth. Witnesses testify and arguments are made. Consequently, a jury deliberates and renders a verdict. The post-trial debriefing is an essential element in helping students put into perspective the facts, issues, and historic aftermath. Such activities enliven and enrich student interaction and understanding of these events and issues.

Moot Courts

The moot court strategy is often confused by some with the mock trial. It involves students as lawyers and judges. However, it is a simulated appeals court rather than a trial court. Hence, no witnesses are called and there is no jury verdict. Rather, lawyers argue whether or not:

1. the law involved was constitutional;
2. the defendant re-ceived a fair trial; and
3. the judge and/or the state representatives of the law acted legally.

A moot court exercise may simulate a Supreme Court hearing of a case. An American history teacher has a wealth of cases to draw upon when this strategy is used to highlight a legal principle or a historical incident. Again, to achieve success, attention must be paid to:

1. planning, preparing, rehearsing;
2. actual moot court hearing; and
3. debriefing, analysis, discussion.

Common cases used by history teachers for moot court hearings include *McCulloch v. Maryland* (1819—power and supremacy of the federal government); *Baker v. Carr* (1962—reapportionment); *Wisconsin v. Yoder* (1972—compulsory schooling and separation of church and state); *Furman v. Georgia* (1972—capital punishment); and *California v. Bakke* (1978—affirmative action, reverse discrimination).

Ethical Episodes

One tool available to the American history teacher who wishes to help students explore moral quandaries in history is the ethical episode. This approach emphasizes the promotion of social responsibility by thoughtful, rational decision making. Alan Lockwood and David Harris have devoted much research and writing to the use of ethical episodes in their 1985 book *Reasoning With Democratic Values Ethical Problems in United States History*.

They argue that

> . . . United States history courses provide an appropriate place for students to explore the meaning of responsible judgment and action. There are several reasons why history is a suitable subject for this enterprise. First of all, history provides events that actually involve complex ethical issues. In examining these events, students can evaluate the thinking and actions of historical figures, thereby developing reasoning abilities that can be applied to current and future circumstances. Second, history presents events that are removed from students' daily lives. This remote-

ness allows for more dispassionate reflection about right and wrong. Judgments are less clouded by the bias and urgency that often hinder clear thinking about current situations, in which there may be personal and immediate emotional involvement. Finally, history demonstrates that conflict over ethical values is not transient. Differences of opinion regarding democratic values are historically persistent. Reflection about these matters is not a contemporary fad, but a recurring and pervasive theme of the United States' heritage.

Use of ethical episodes as case studies involves the following activities:

1. providing students with appropriate and sufficient historical background for the episode;
2. providing the actual ethical episode to be studied;
3. having students do an ethical analysis of the episode;
4. engaging students in small group/large group discussion about the episode; and
5. summarizing main ideas and conclusions drawn from the analysis and discussion of the episode.

Lockwood and Harris suggest several variations on the above elements and ethical episode strategy. Use of "written dialogue" to enhance systematic reflection on the nuances of the issues and reasoning used in the episode is suggested. "Tape recorded dialogue" allows student teams to share ideas in a structured format as part of their analysis. When taping is completed, pairs of students share their work in a larger group. At this point a review for good reasoning, clear expressions of ideas, and responsiveness to opposing arguments can take place. Finally, "historical acting" is suggested with an episode. Such acting is meant to further student understanding of the differing points of view as well as refining of the ethical dilemma. This form of role-playing is engaging and causes students to stretch their thinking in an active fashion.

Use of ethical episodes requires good discussion skills and effective questioning techniques on the part of the teacher and the students. Attention must be paid to these areas if an ethical episode is to be more than a "bull session." As with case studies and mock trials, ethical episodes can be used almost anywhere in the American history curriculum. Lockwood and Harris have created 49 episodes for possible use in an American history course. A few examples of these include:

- Defending the Redcoats (John Adams)
- A Woman's Place is in the Factory (Lowell Mill Strikes)
- Freemen to the Rescue (Fugitive Slave Law in Wisconsin)
- Speaking His Piece (Eugene Debs)
- United We Sit (Flint Sit-Down Strike)
- The Unluckiest Kid (Private Eddie Slovik)
- Cover-up Uncovered (John Dean and Watergate).

Teachers can certainly create their own episodes as they see fit in the curriculum. The key factor in selecting an ethical episode is whether it provokes reflective thinking. Used effectively, an episode can enliven and deepen any study of American history.

Primary Sources/Documents

American history teachers for generations have made use of primary sources and historical documents at certain points in the curriculum. As greater emphasis has been placed on law-related education, use of documents has expanded. Projects such as *Lessons on the Constitution* (Project '87 and the Social Science Education Consortium; Patrick and Remy, 1986) and *Religion in American History* (ASCD; Haynes, 1990) give special attention to the use of documents in teaching American history and the law. Use of such documents can be infused into the curriculum and often provides important information that textbooks omit. Most important, primary source documents are written by actual historical participants in the events being studied. Such documents make the story "come alive." Once more, they are the real tools of historians and can give students insights into the craft of history. Finally, use of such documents pushes students to use higher order thinking skills as they work to analyze points of view, biases, contradictions, and limits of the documents. Students come to understand that there is more than one "right" interpretation of primary source documents and that there is more than one way to understand history (Haynes).

Below are some sample titles of lessons using documents from the two above cited works. These lessons incorporate debates, forums, writing activities, role plays, discussions, moral dilemmas, and several other strategies to achieve their particular objectives. In each case, the primary source document is the central focus which drives the lessons. Facsimiles of the documents and/or transcriptions are provided for each lesson.

Lessons on the Constitution (Patrick and Remy)

1. Opinions about Government under the Articles of Confederation
2. Ideas from the Federalists Papers
3. The Whiskey Rebellion: A Test of Federal Power
4. Two Responses to a Constitutional Crisis: Decisions of Buchannan and Lincoln about Secession
5. The Courts' Use of Dissent

Religion in American History (Haynes)

1. How High A Wall? A Letter from the Danbury Baptist Association to President Thomas Jefferson, October 7, 1801
2. The Beginnings of Nativism in American: An Anti-Catholic Petition from New York Nativists, 1837
3. The School Controversy: A Memorandum from William O. Douglas to Hugo Black, June 11, 1962
4. The Needs and Requirements of Muslim Students: A Letter from the Islamic Society of North American to Public School Administrators

Community Resources

It is not uncommon for social studies classrooms to host guest speakers during the course of a year. In those classrooms where law-related education is being emphasized, guest speakers and field trips become a regular feature of instruction. Depending on the topic being studied, speakers might include: a political scientist, a sociologist, a jurist, a historian, an elected official, a pollster, an immigrant, a senior citizen, a police official, a correction officer, a social worker, a regulatory agency official, a media person, an eyewitness to a historic event, to name just a few.

Careful preparation and planning regarding both the speaker and the audience will more likely result in a positive learning experience. Such preparations include clear identification of goals; careful arrangements of physical setting; agreement on time frame and ground rules for audience participation; and a thorough debriefing of the experience. Also, identifying appropriate background information, confirming the relevancy of the speaker to the concepts/information being studied, and brainstorming possible questions to be asked are important preliminary steps.

Use of community resources provides some important advantages to students and the community. These include exposing students to a variety of viewpoints and perspectives; personalizing for students the "real people" in those roles; sharpening the skills of listening and critical inquiry; and allowing community persons to become an active part of the schooling process. As speakers become a repeated part of instruction, the teacher can clearly see the growth of questioning skills and perceptions of the students.

Use of community resources might also involve a site visit to a particular agency, institution, courthouse, university, museum, or historic location. While time consuming and somewhat disruptive to the normal schedule, such visits have the potential to spark some out-of-the-ordinary learning opportunities. Seeing the "real place," some "real people," and the "actual process" being studied can enrich student perspectives and make history and law classes come alive.

A variation on the class field trip strategy is to have individual students or teams of students do site visits. Field observations by students can prove very worthwhile and empowering to participants and may offer opportunities for peer teaching. The necessary planning and execution of student site visits and the follow-up peer teaching experience can provide students with valuable skill opportunities and learning experiences. As with any experiential learning strategy, thoughtful preparation, guidance, and counsel of the teacher are essential.

Writing Strategies

In each of the previously mentioned strategies, various aspects of writing are important components which help students better learn specific historical and legal concepts. Some of the skills called upon include:

Case studies: legal brief writing, defense of a position, and/or decision writing;

Role playing: script writing, keeping a journal, notetaking and/or debriefing summaries;

Mock trials: script writing, research notes, question writing, observation notes, and decisions;

Ethical episodes: note taking, brainstorming data, issue identification, argument identification, research notes, and position papers;

Primary source/documents: written document analysis and analytical papers; and

Community speakers and field trips: written correspondence, creation of question banks, note taking, summarization of findings/experiences, and written plans for peer-teaching.

In addition to the above-mentioned writing activities, there are several more strategies that might be of use in an American history class where legal concepts are being stressed. Position papers can be assigned as a result of a case study, guest speaker's presentation, etc. Students can investigate in greater detail the historical settings, the personalities involved, the composition of the court, the social issues of society at the time, or the impact of the court decision on society.

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Another twist might be to assign students to "cover the story" of a case or historical incident for a local newspaper. The resulting "story" could include an investigation of the facts, a review of the decision, and/or a description of the anticipated effects of the court ruling or historical incident. Students could be assigned to represent newspapers with differing political views. Finally, students could research editorials and articles from the time period of the court decision or incident. They could then write a current-day editorial or article on the importance of the decision or incident for today's society. Of course the traditional research paper can easily be assigned to this type of study. Students who are provoked and motivated by some intense discussion, debate, ethical reflections and/or a guest speaker or field observation will often engage more quickly and more thoroughly in a research project. Multimedia projects using video and computer technology provide additional outlets for student creativity and research skills.

Oral Teaching Strategies

As increased attention is being given to authentic or performance assessment in our classrooms, students are being asked to exhibit their work and their growth in knowledge and skill development in a variety of ways. Many such strategies and assessments use an oral presentation approach that is particularly fitting for a law and history focused lesson. Persuasive speeches, debates, skits, and readers theater are just a few of the techniques successfully used to instruct, motivate, and assess students.

Particularly important in these approaches are the following:

1. clarity of goals, instruction, expectations;
2. sufficient preparation time;
3. appropriate models for review and consideration;
4. rehearsal time; and
5. debriefing and feedback.

Many of these activities can be used with broader audiences than a single classroom. Cross-age and cross-discipline instruction may be appropriate. In some cases, such as public forums or roundtable discussions, invitations to include parents, senior citizens, or the community-at-large are appropriate. Peer-teaching strategies give students the valuable experience of organizing, preparing and presenting legal and historical material that is hard to replicate in any other fashion.

Conclusion

This article began with the premise that the study of American history and the study of law are inextricably intertwined. To engage in such a study without attention to the law and its evolution and influence on society would result in an incomplete and short-sighted examination. The teaching strategies outlined here are meant to call attention to the rich and diverse choices available to teachers as they undertake this serious and exciting challenge. The use of these methods presupposes that one sees students as active participants in their own education. Likewise, these strategies assume that teachers are committed to both the intellectual integrity of content and the importance of process in the education equation. Law and American history are a necessary combination for understanding who we are and a powerful one for motivating students. It is something all of our students deserve to experience first hand.

Additional Reading

Acting Together: Readers Theater: Excerpts from the Constitution. Edited by Arlene Gallagher. (Boulder, CO: Social Science Education Consortium, Inc., 1991).*American Album: 200 Years of Constitutional Democracy.* (Los Angeles: Constitutional Rights Foundation, 1986).

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Curriculum Review: Law and U.S. History

Phyllis Maxey Fernlund

History is often listed by students as their least favorite subject. They complain about content that has little meaning for them and history classes with endless lists of facts to memorize. Teachers need materials that move beyond the memorization of facts to engage students' imagination and critical thinking abilities. Law-related education materials have modeled active learning for the last thirty years. The following resources can enhance the teaching of U.S. History so that the complexity, conflict, and richness of people trying to live together becomes an integral part of legal, social, and historical perspectives.

Infusion of Law into U.S. History

Public Issues Series (1991). Student books on eight topics are each 67 pages. $3.50/copy. Social Science Education Consortium, 3300 Mitchell Lane, Suite 240, Boulder, CO 80301-2272.

One of the most successful social studies projects of the 1960s was the Harvard Social Studies Project. The Social Science Education Consortium (SSEC) has revised and updated this series which includes student books and teacher's guides for The American Revolution, Religious Freedom, Civil War, Railroad Era, Immigration, Rise of Organized Labor, Progressive Era, and New Deal. These materials are designed to help young people discuss persisting issues and begin to wrestle with opposing viewpoints on public policy. The Railroad Era includes a section on Supreme Court cases from the 1880s: *Munn v. Illinois*, *Wabash v. Illinois*, and *ICC v. Alabama Midland Railway Co.* A fictional Senate hearing is used to dramatize the issues as they relate to airline deregulation today. This format is used throughout the series, with an integration of history, law, contemporary cases, and public policy debate.

To Promote the General Welfare: The Purpose of Law (1985). Coral Suter and Marshall Croddy. Student book: 48 pp., $6.50. Constitutional Rights Foundation, 601 South Kingsley Drive, Los Angeles, CA 90005.

The integration of law and U.S. History in this book is based on the proposition that the legal system can help demystify other democratic institutions. The processes used to make legal decisions are explored as well as the historical circumstances that brought about change. Role play, simulations, and other active learning strategies that characterize this curriculum help to make the historical content interesting and meaningful to students. Lessons are clustered in five units: Lawmaking during the American colonial period, the War of 1812, the Civil War with an examination of *Ex Parte Milligan*, the Industrial Revolution and child labor law, and the Prohibition era.

Law in U.S. History: A Teacher Resource Manual (1983). Melinda Smith (ed.) 335 pp. Social Science Education Consortium, 3300 Mitchell Lane, Suite 240, Boulder, CO 80301-2272.

This collection of activities provides teachers with law-related instructional strategies such as the case study, mock trial, and appellate court simulations. Four historical eras serve as organizers, although many of the lessons span a greater period of time: Colonial period, national period, Civil War through industrialization, and the modern era. There are 37 lessons designed for infusion into U.S. History classes.

Phyllis Maxey Fernlund is Professor of Education and Chair of Secondary Education at California State University, San Bernadino. She also serves on the Teacher Education Board of the ABA Special Committee on Youth Education for Citizenship and is Chair of the National Council for the Social Studies Committee on Instructional Technology.

Multimedia Resources

The Time Magazine Compact Almanac. (1993). CD-ROM for IBM or Macintosh. $195.00. Social Studies School Service, 10200 Jefferson Blvd., P.O. Box 802, Culver City, CA 90232.

This program stores the full text of every issue of *Time* from 1989-June 1992. The disk has articles, historical photos, legal cases, charts and maps, as well as CNN Newsroom videos on such topics as the Gulf War, Russian Revolution, and the Clarence Thomas hearings. Also included are 10,000 articles that date back to 1923 on key people and events.

Powers of the U.S. Government videodiscs (1992). $495.00/disc. ABC News Interactive. Distributed by the Optical Data Corporation, 30 Technology Drive, Warren NJ 07059; (800) 524-2481.

Powers of the President, Powers of Congress, and Powers of the Supreme Court integrate both historical and contemporary events using full motion video, English or Spanish audio, closed captions, and lesson plans. The Powers of Congress includes such subjects as patents and copyrights, impeachment procedures, amendments, rules and privileges of members of Congress, admission of new states, and the process of becoming a U.S. citizen. The Center for Research and Development in Law-Related Education (CRADLE) at Wake Forest University School of Law has prepared Hypercard software to accompany the videodisc, Powers of the Supreme Court.

LREnet Electronic Bulletin Board for LRE and Citizenship Educators. No charge. The Center for Research and Development in Law-Related Education (CRADLE), P.O. Box 7206, Reynolda Station, Winston-Salem, NC 27109.

The bulletin board allows educators to communicate with each other and to review teacher-developed lesson plans stored in the system from CRADLE's national repository. History-based LRE lessons are available to download if one has the necessary equipment: a computer, a modem, and a telecommunications software package. This service is an important source of up-to-date information on resources such as curriculum materials and conferences. The access number for LREnet is (919) 759-4709.

Constitutional Studies

The celebration of the Bicentennial of the U.S. Constitution and Bill of Rights resulted in the production of valuable curriculum materials for teaching U.S. History. The importance of gaining an understanding of the Constitution from both a historical and a legal perspective is vital in educating children and youth to participate in a democratic society.

American Album. Constitutional Rights Foundation, 601 S. Kingsley Drive, Los Angeles, CA 90005.

This history text for grades 8-12 links the people, events, eras, and issues in the American history curriculum to the Constitution and its place in American life. Includes activities and illustrations.

The Bill of Rights. (1990). Available from SIRS, Inc., P.O. Box 2348, Boca Raton, FL 33427-2348. (800) 327-0513.

This teaching unit produced by the National Archives and Records Administration is designed to 1) help students of U.S. history, government, and economics understand the process by which history is written; and 2) develop students' analytical skills. Includes a variety of photographs, documents, charts, plus a detailed teacher's guide.

The Bill of Rights: A User's Guide (1991). Linda R. Monk. 246 pp. Close Up Foundation, 44 Canal Center Plaza, Alexandria, VA 22314; (703) 706-3300.

This book emphasizes the historical foundation for the Bill of Rights and its continuing importance to contemporary life. Each of the ten amendments is explained in a separate chapter with a historical perspective on the development of these rights and landmark cases that further define the meaning of these rights. A Teacher's Guide provides suggestions for student activities, as well as handouts such as warrants, data charts, and scenarios for decisionmaking.

The Constitution: Evolution of a Government. Available from SIRS, Inc., P.O. Box 2348, Boca Raton, FL 33427-2348. (800) 327-0513.

Produced by the National Archives and Records Administration, this guide for use in grades 8-12 contains 34 documents with 20 classroom lessons at three reading levels. Features units on The Making of the Constitution, The Beginning of a Government, The Evolution of a Constitutional Issue (First Amendment: Religious Freedom.

Equal Justice Under Law: The Supreme Court in American Life. M. Harrell and B. Anderson. 159 pp. *Instructor's Guide.* Isidore Starr. 87 pp. (1982). Published by the Supreme Court Historical Society in cooperation with the National Geographic Society. Available from American Bar Association/YEFC.

This survey of landmark cases for junior/senior high school students examines the role of the Supreme Court in U.S. history. The instructor's guide includes 16 classroom lessons, a glossary, as well as guidelines for using case studies and conducting moot courts.

Great Trials in American History: Civil War to the Present (1985). Lee Arbetman and Richard Roe. 209 pp. National Institute for Citizen Education in the Law and West Publishing Company, 50 W. Kellogg Blvd., P.O Box 64526, St. Paul MN, 55164.

The teacher of U.S. History will

find interesting cases in this book to integrate into a junior or senior high school history course. John T. Scopes, Fred Korematsu, the Chicago Eight, and Allan Bakke are among those whose stories are told in an interesting way that allows students to get to know the people involved in these cases as well as the legal principles.

Helping Children to Understand the U.S. Constitution (K-6), (12 pp.) *Celebrating Our Constitutional Heritage with Young People* (6-12) 21 pp. $2.00 each. American Bar Association/YEFC.

These handbooks for elementary and secondary level instruction include activities, information and resources for use in schools and communities on the historical origins of the U.S. Constitution.

It's Yours: The Bill of Rights (1993). Sheila Brady, Carolyn Pereira, Diana Hess. Constitutional Rights Foundation Chicago, Published by Steck-Vaughn Co., P.O. Box 26015, Austin, TX 78755.

These materials are especially important for teachers of English as a Second Language or sheltered English classes. Each of the units provides an easy-to-read explanation of the amendments and historical origins. Graphic organizers, vocabulary exercises, and an emphasis on cooperative learning are used to assist students at various stages of language development to learn this constitutional subject matter.

The Jefferson Meeting on the Constitution: The Constitution in the Classroom. The Jefferson Foundation, 1529 18th St., N.W., Washington, DC 20036.

A teacher's guide to using the Jefferson meeting as an educational tool in grades 8-12 emphasizes student involvement, first in small groups and then in general session debating specific public policy issues in historical/constitutional context.

Lessons on the Constitution: Supplements to High School Courses in American History, Government and Civics (1986). John Patrick and Richard Remy. 302 pp. Published by Project '87, a joint project of the American Historical Association, the American Political Science Association, and the Social Science Education Consortium, 3300 Mitchell Lane, Suite 240, Boulder, CO 80301-2272.

These supplementary curriculum materials provide the high school teacher and students with additional background on constitutional history and theory. Summaries of 20 Supreme Court cases beginning with *Marbury v. Madison* (1803) and ending with *United States v. Nixon* (1974) are a helpful resource, in addition to a collection of documents, including amendments to the Constitution that were proposed but not ratified and selected Federalist Papers. Forty lessons include background information for the teacher, student exercises, and suggested lesson plans.

Lessons on the Federalist Papers: Supplements to High School Courses in American History, Government and Civics. (1987). John Patrick, Richard Remy and Mary Jane Turner. Available from ERIC/ChESS, 2805 E. Tenth St., Suite 120, Bloomington, IN 47408; (812) 855-3838.

A guide to teaching *The Federalist Papers* in high school classes, focusing on issues of constitutional government, and developing reasons for a commitment to the values of constitutional government. Includes 10 lessons, selections from *The Federalist Papers*, and a bibliography.

Resources for Teachers on the Bill of Rights (1991). John Patrick and Robert S. Leming. 214 pp. ERIC Clearinghouse for Social Studies/Social Science Education, Indiana University, 2805 E. 10th Street, Bloomington, IN 47408-2698; (812) 855-3838.

A comprehensive collection of materials relating to the Bill of Rights, including background papers and documents. Contains nine lessons on the Bill of Rights for elementary and secondary students, as well as listings of additional resources for teachers.

Rights of the Accused (1991) Free. 200 pp. Minnesota Center for Community Legal Education, Hamline Law School, 1536 Hewitt Ave., St. Paul, MN 55104; (612) 641-2411.

This collection of lessons on the 4th, 5th, 6th, 8th, and 14th Amendments was developed by secondary school teachers to provide a historical context for the development of these constitutional rights.

Update on Law-Related Education, Fall 1988 issue. 89 pp. $6.00. Available from American Bar Association/YEFC.

Contains articles and teaching strategies on civil rights, Native Americans, and the women's movement, as well as a review of children's books on minorities. Also included in the issue are six papers presented at "Afro-Americans and the Evolution of a Living Constitution," a symposium sponsored by The Smithsonian Institution and The Joint Center for Political Studies.

Update on Law-Related Education, Fall 1991 issue. 49 pp. $6.00. Available from American Bar Association/YEFC.

Titled "Extending the Bill of Rights: The Civil War Amendments," this issue focuses on the role of the Civil War Amendments in defining the extent of equal protection, with particular emphasis on the historical and ongoing role of the Supreme Court.

U.S. Supreme Court Decisions: A Case Study Review for U.S. History and Government (1989). 52 pp. Project P.A.T.C.H. and the New York State Bar Association, 1 Elk Street, Albany, NY 12207; (518) 474-1460.

In this LRE project, the required 11th grade U.S. History course

Additional Resources

The National Archives and Records Administration has a number of educational packets on the Bill of Rights and Constitution available for use in high school classrooms. For more information, contact: The National Archives and Records Administration, 7th and Pennsylvania Ave., N.W., Washington, DC 20408; (202) 501-5215.

ERIC/ChESS (Education Resources Information Center/Clearinghouse for Social Studies/Social Science Education) is a clearinghouse for materials on Social Studies/Social Science. Materials available include curriculum guides, teaching units, bibliographies, articles and research reprints. Contact: ERIC/ChESS, 2805 E. Tenth St., Suite 120, Bloomington, IN 47408; (812) 855-3838.

Periodicals

Constitution is a quarterly magazine devoted to the Constitution and U.S. history. For more information, contact: Foundation for the United States Constitution, 1271 Avenue of the Americas, New York, NY 10020; (212) 522-5522.

The Bill of Rights in Action addresses issues relating to the Bill of Rights. Contact: Constitutional Rights Foundation, 601 S. Kingsley Drive, Los Angeles, CA 90005; (213) 487-5590.

becomes "American History Through Constitutional Law." Supreme Court cases are reargued by students before a panel of justices. The students submit a one-page brief outlining their argument. The book includes a format for the written brief, including facts, issue, precedents, and opinion. Summary reviews of over 40 Supreme Court cases are presented, as well as a glossary and pre/post test.

Vital Issues of the Constitution. Great Cases of the Supreme Court (1989). 152 pp. Robert Ratcliffe, Irving Gordon, E. Walter Miles. Houghton Mifflin Co., One Beacon Street, Boston, MA 02108.

Each of the books offers high school and middle school students an opportunity to follow an important constitutional principle over time through the study of several cases. Changes in the law to respond to changes in society and struggles for justice are highlighted within a common theme. The high school text has a chapter on freedom of expression that begins with the case of John Peter Zenger (1735) and concludes with *Hazelwood School District v. Kuhlmeier* (1988).

We The People (1989). 197 pp. Elementary level: $5.00. Middle school level: $5.50. High school level: $6.00. *With Liberty and Justice for All: The Story of the Bill of Rights* (1991) Center for Civic Education, 5146 Douglas Fir Road, Calabasas, CA 91302; (800) 350-4223.

These materials present basic constitutional principles and values to enable students to develop a more sophisticated working vocabulary to discuss and think about democratic theory. The Teacher's Guide suggests a variety of active learning strategies to enable students to use these principles to take positions on constitutional issues. The high school level text is organized into lessons that each ask a question such as: "How can constitutional governments be organized to prevent the abuse of power?" "What caused the rise of political parties?" "How has your right to freedom of religion been guaranteed?" The six units focus on political philosophy, history, the Constitution, establishment of government, fundamental rights, and the responsibilities of the citizen. The preface to the Bill of Rights text describes the book as "a history of ideas that have influenced the development of our Bill of Rights and its application to the events of today." Critical thinking exercises, incorporated in all of the lessons, are structured for discussion with a partner or in a small group.

Women and the Constitution: A Curriculum Unit (1992). Molly Murphy MacGregor. 59 pp. $8.50. National Women's History Project, P.O. Box 3716, Santa Rosa, CA 95402; (707) 526-5974.

This booklet highlights the role played by women throughout history in improving the legal status of women. Beginning with the Revolutionary War period through the proposed Equal Rights Amendment, these materials include such cases as *Bradwell v. Illinois*, *Muller v. Oregon*, and *Frontiero v. Richardson*. The words of Abigail Adams, Susan B. Anthony, Sojourner Truth, and Elizabeth Freeman provide their perspectives on the Constitution and proposed amendments.

Additional Resources

Ackerman, Bruce. *We the People: Foundations.* (Cambridge, MA: The Belknap Press of the Harvard University Press, 1991).

Botein, Stephen. *Early American Law and Society.* (New York: Random House, 1980).

Contemporary Perspectives on the Constitution and Separation of Powers. (Chicago: American Bar Association Special Committee on Youth Education for Citizenship, 1990).

Contemporary Perspectives on the Enduring Constitution: A Bicentennial Primer. (Chicago: American Bar Association Special Committee on Youth Education for Citizenship, 1991).

Dargo, George. *Law in the New Republic: Private Law and the Public Estate.* (New York: Alfred A. Knopf, 1983).

Fehrenbacher, Don Edward. *The Dred Scott Case: Its Significance in American Law and Politics.* (New York: Oxford University Press, 1978).

Fetner, Gerald L. *Ordered Liberty: Legal Reform in the Twentieth Century.* (New York: Alfred A. Knopf, 1983).

Hall, Kermit L. (ed.) *By and For The People: Constitutional Rights in American History.* (Arlington Heights, IL: Harlan Davidson, Inc., 1991).

Hall, Kermit L. *The Magic Mirror: Law in American History.* (New York: Oxford University Press, 1989). Note: Includes a 15-page annotated bibliographic essay on American legal history scholarship.

Hall, Kermit, William M. Wiecek, and Paul Finkelman. *American Legal History: Cases and Materials.* (New York: Oxford University Press, 1991).

Hartog, Hendrick, ed. *Law in the American Revolution and the Revolution in the Law.* (New York: New York University Press, 1981).

Hurst, James Willard. *Law and Social Order in the United States.* (Ithaca: Cornell University Press, 1977).

Hyman, Harold M. and William M. Wiecek. *Equal Justice under Law: Constitutional Development 1835-1875.* (New York: Harper and Row, 1982).

Lockwood, Alan L. and Harris, David E. *Reasoning with Democratic Values: Ethical Problems in United States History.* (New York: Teachers College Press, 1985).

Lurie, Jonathan. *Law and the Nation, 1865-1912.* (New York: Alfred A. Knopf, 1983).

McDonald, Forrest. *Novus Ordo Seclorum: The Intellectual Origins of the Constitution.* (Lawrence, Kan.: University Press of Kansas, 1985).

Murphy, Paul. *The Constitution in Crisis Times, 1918-1969.* (New York: Harper and Row, 1972).

Perry, Richard L. (ed.) *Sources of Our Liberties—Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights.* (Chicago: American Bar Foundation, 1978).

Presser, Stephen B. and Jamil S. Zainaldin, eds. *Law and American History: Cases and Materials.* (St. Paul: West Publishing, 1980).

Reid, John Phillip. *Constitutional History of the American Revolution: The Authority of Rights.* (Madison: University of Wisconsin Press, 1986).

Salmon, Marylynn. *Women and the Law of Property in Early America.* (Chapel Hill: University of North Carolina Press, 1986).

This Constitution: From Ratification to the Bill of Rights. Project '87 of the American Historical Association and the American Political Science Association. (Washington, DC: Congressional Quarterly, Inc., 1988).

Urofsky, Melvin I. *A March of Liberty: A Constitutional History of the United States.* (New York: Alfred A. Knopf, 1988).

Walker, Samuel. *Popular Justice: A History of American Criminal Justice.* (New York: Oxford University Press, 1980).

Wiecek, William M. *Liberty under Law: The Supreme Court in American Life.* (Baltimore: Johns Hopkins University Press, 1988).

Zainaldin, Jamil S. *Law in Antebellum Society: Legal Change and Economic Expansion.* (Chicago: American Bar Association, 1980).

BEST COPY AVAILABLE

Teaching Strategy

C.E.R.T. (Constitutional Enrichment Through Research, Reasoning, and Testimony)

Thomas J. O'Donnell

In Supreme Court parlance, "cert" is short for "writ of certiorari." This is an order issued by a superior court (here the U.S. Supreme Court) to an inferior court, asking it to certify the record in a case and return it to the higher court so that it can determine whether the lower court committed any legal errors. It is the main (but not the only) way the Supreme Court takes jurisdiction over a case. This C.E.R.T. teaching strategy will provide students with an historical perspective on modern civil rights issues by asking them to reargue some of the most important civil rights cases from the Civil War era.

Objectives

- Students will improve and enrich their knowledge of U.S. history from 1840-1896 through written and oral classroom arguments before a moot court.
- Students will improve their understanding of modern constitutional principles by studying their historical roots.

Skills Objectives

- Reading Comprehension
- Cooperative Learning
- Factual Identification
- Note Taking
- Oral Presentation
- Recall
- Time Management
- Creative & Critical Thinking
- Civic Virtue
- Use of Written Resources
- Legal Writing

Grade Level

This strategy is suitable for students in grades 9-12.

Materials

Copy of the U.S. Constitution and the Declaration of Independence; a good survey casebook of U.S. Supreme Court decisions; a good survey U.S. History text; and when possible, the complete text of the cases discussed.

Time Needed

1st day: review of cases; (see case summaries—Student Handout #1);
2nd/3rd days: written and oral research and preparation (Student Handout #2); and
4th through 7th days: present two cases per period each day

Methods

- Oral and written moot court arguments.
- Cooperative research, analysis, and presentation.

Procedures

This teaching strategy includes three handouts. The first draws upon *The Oxford Companion to the Supreme Court of the United States* (Oxford, 1992) to summarize some of the leading Supreme Court cases decided between 1842-1896, as well as constitutional amendments and major civil rights laws from the period. The second is an outline instructing students how to brief a legal case, and the third is a rating sheet students and teachers can use to debrief each case.

Students will use these handouts to reargue some of the many landmark 19th century civil rights cases.

1. Review with your students the Supreme Court case summaries on Student Handout #1.
2. Please couple your review with a brief presentation or reading about the history of this period. Students' understanding of slavery, the abolition movement, segregation, and the economic concerns of the times will help their understanding of why the cases were decided the way they were.
3. Using whatever way you and your class determine is fair, divide your students into groups of two teams, with two or three students on each team. Have each group of two teams select one case from those given, then pick which side they want to represent, petitioner or respondent. Have students prepare a one-page, typed brief and a five-minute oral argument to support their position in the case.
4. Select a date for students to present their oral arguments. Invite administrators, teachers, lawyers, judges, and parents to sit on the bench as justices for the oral arguments.

Thomas J. O'Donnell is Director of Project P.A.T.C.H. for the Northport-East Northport Union Free School District in Northport, NY.

5. The bench should ask students questions during the oral arguments. Questions should be about the specific case and the history of the times. The court can also ask common sense questions about the events in the case and about how its ruling one way or the other will affect America.

An important note about references: your high school or local library, or a nearby law school or county law library, can help you locate the full text for the cases used in this activity. The dissenting opinions are an important part of the full text and a useful resource for the team rearguing the "losing side" of 19th century cases. See if you can locate these opinions for your students. Schools linked to a data base system, such as Lexis or Westlaw, have easy access to the full text of these cases.

Evaluation

Use Student Handout #3 to debrief each case with students.

Student Handout #1

Case Summaries (and laws/amendments)

1842 *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

This case involved a conflict between Edward Prigg, a professional slave catcher, and the state of Pennsylvania. In 1837, Prigg seized a runaway slave in that state and applied to a justice of the peace for certificates of removal under the federal Fugitive Slave Act of 1793. The justice of the peace refused. Then, without any legal authority, Prigg took the slave and her children to Maryland. Pennsylvania indicted Prigg for kidnapping under Pennsylvania's 1826 personal liberty law.

By a 8-1 vote in early 1842, the U.S. Supreme Court ruled that the federal fugitive slave law was constitutional and that the Pennsylvania personal liberty law was unconstitutional for adding new requirements to the extradition process for fugitive slaves.

1857 *Scott v. Sandford*, 60 U.S. 393 (1857).

One of the most infamous cases in American history. Dred Scott, a slave, had been taken by his master to several free states and territories. After they returned to Missouri, a slave state, Scott sued for his freedom. He prevailed in the trial court, but lost before the Missouri Supreme Court. He then sued again, this time in federal court.

By a 7-2 vote, on March 6, 1857, the U.S. Supreme Court held that Scott was still a slave and that African Americans, whether slave or free, were not citizens of the United States and therefore could not sue in federal court. The Court also declared the Missouri Compromise (which forbade slavery in certain territories) unconstitutional, reasoning that Congress did not have authority to prohibit slavery in the territories.

1865 Thirteenth Amendment to the U.S. Constitution. Ratified on December 6, 1865, it outlawed slavery and involuntary servitude and gave Congress authority to enforce the amendment by appropriate legislation.

1868 Fourteenth Amendment to the U.S. Constitution. Ratified on July 9, 1868, it declares that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and to the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process or law; nor deny to any person within its jurisdiction the equal protection of the laws." In effect, this amendment overturned the *Dred Scott* decision. It also gave Congress the authority to pass appropriate legislation, paving the way for such legislation as the Civil Rights Act of 1871.

1870 Fifteenth Amendment to the U.S. Constitution. Ratified on February 3, 1870, it states that the right of citizens to vote shall not be denied or abridged by race, color, or previous condition of servitude.

1869 *Ex Parte McCardle*, 74 U.S. 506 (1869).

Army officials administering Reconstruction in Mississippi arrested a Vicksburg editor, William McCardle, on the charge of inciting insurrection. They ordered him tried by a military court. Arguing that the Reconstruction Acts were unconstitutional, he sought relief from a U.S. circuit court of appeals under the Habeas Corpus Act of 1867. When he lost before that court, he appealed to the U.S. Supreme Court. Before the case could be heard, Congress, seeking to prevent the Court from ruling on the constitutionality of the Reconstruction Acts, repealed the Supreme Court's appellate jurisdiction to hear cases arising under the Habeas Corpus Act.

By a unanimous vote, on April 12, 1869, the U.S. Supreme Court decided that, under the Constitution, Congress has the authority to make exceptions to the appellate jurisdiction of the U.S. Supreme Court, and it therefore dismissed the case for want of jurisdiction. However, the Court noted that it had jurisdiction under other statutes, such as the Judiciary Act of 1789, and it later took habeas corpus suits brought under that Act.

1871 Civil Rights Act

The activities of the Ku Klux Klan, along with other efforts to disrupt Reconstruction in the post-war South, caused Congress to pass a sweeping statute providing for equal rights under the law, including property rights, and granting aggrieved parties the right to sue for damages. 42 U.S.C.A. sections 1981-1985. Although these provisions were largely unenforced until the middle of the next century, today they are of immense importance. A statute passed in 1948 also criminalized actions that are designed to deprive citizens of these rights, providing fines of up to $10,000 and sentences of up to 10 years. 18 U.S.C.A. sections 241 and 242.

1873 *Butchers Benevolent Association of New Orleans v. Crescent City Livestock and Slaughterhouse Co.; Esteben v. Louisiana*, 83 U.S. 36 (1873).

These are usually referred to as the "slaughterhouse cases." A monopoly given to one company by the State of Louisiana allowing it to conduct all slaughterhouse business in New Orleans—under the state's police power to improve sanitation—was challenged by other butchers in the state. These butchers claimed that the monopoly denied them the privileges, immunities, and property rights they had as citizens of the United States under the guarantees of the 14th Amendment.

By 5-4 vote on April 14, 1873, the U.S. Supreme Court upheld the state law. It decided that persons have two distinct types of citizenship, federal and state. The Court ruled that the right to do business in a state is not derived from one's U.S. citizenship. The Court reasoned that any other decision would be perceived as a "perpetual censor upon all state legislation with respect to the civil rights of state citizens." Though the case did not deal directly with the rights of minorities, by limiting the "Privileges or Immunities Clause" of the Fourteenth Amendment, it may have weakened the ability of the federal government to protect their rights.

Student Handout #2

A Supreme Court Argument and Brief

All oral arguments and written briefs should follow a similar outline:

Oral Argument	Written Brief
1. Facts Stated and Historical Awareness	Facts in Case
2. Constitutional Issue	Constitutional Issue
3. Opinion/Conclusion	Opinion/Conclusion
4. No More Than Five (5) Minutes	Handwritten, 1 Page; Should Be Used Only to Help Organize the Oral Presentation

The Bench

The Bench will be encouraged to ask questions of the students during their formal presentation. Questions will be directed at the content of the oral arguments. They should not be adversarial, but designed to clarify the students' arguments.

Format for a Brief

Title:	Should include the legal citation to the case, showing the volume in which the case appears in the U.S. Reports, the starting page number, and the date of decision; e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954).
Facts:	Name the parties involved in the case (petitioner, respondent) and give a well-phrased overview of what actually happened up until now. Please include any necessary historical background. Use no more than 6-7 lines.
Issue:	What are the constitutional issues involved? State each issue as a question that can be answered with a "yes" or a "no." Use no more than 2-3 lines.
Precedents:	If possible, list previous cases that might pertain to this case.
Opinion/Conclusion:	In your own words, where do you stand? What are you trying to convince the Court to rule? Give a strong plea to the bench to support your point of view.

1883 *Civil Rights Cases*, 109 U.S. 3 (1883).

By an 8-1 vote on October 15, 1883, the U.S. Supreme Court decided that discrimination against blacks in *privately owned* public accommodations did not violate the 13th or 14th Amendments. A private individual's refusal to accommodate had nothing to do with the 13th Amendment's prohibition of slavery or the 14th Amendment's prohibition of *state-sponsored* discrimination. The Civil Rights Act of 1964 banned discrimination in public accomodations.

1896 *Plessy v. Ferguson*, 163 U.S. 537 (1896).

By a 7-1 vote on May 18, 1896, the U.S. Supreme Court decided that state law providing "separate but equal" facilities for African Americans and whites did not infringe on the federal power to regulate interstate commerce nor did it violate the 13th and 14th Amendments' guarantee of political equality.

By sanctioning state segregation laws, this case dramatically weakened civil rights efforts before its reasoning was rejected in *Brown v. Board of Education*, 347 U.S. 483 (1954).

Student Handout #3

RATING SHEET

Recommended:	1 Point	2 Points	3 Points	4 Points
Rating:	*Good*	*Very Good*	*Excellent*	*Superior*

The above is merely a guideline for your rating of the briefs and arguments.

CASE #: ____________________ DATE: ____________

PETITIONER COUNSELORS: ______________________________ / ______________________________

	RATING	COMMENTS
STATEMENT OF FACTS:		
CONSTITUTIONAL ISSUE:		
HISTORICAL ACCURACY:		
SUPPORTING EVIDENCE:		
LOGIC:		
RESPONSE TO QUESTIONS:		
CREATIVITY:		
OPINION:		
		TOTAL POINTS

RESPONDENT COUNSELORS: ______________________________ / ______________________________

	RATING	COMMENTS
STATEMENT OF FACTS:		
CONSTITUTIONAL ISSUE:		
HISTORICAL ACCURACY:		
SUPPORTING EVIDENCE:		
LOGIC:		
RESPONSE TO QUESTIONS:		
CREATIVITY:		
OPINION:		
		TOTAL POINTS

Teaching Strategy

Prejudice, Hysteria and a Failure of Political Leadership

Ellery M. "Rick" Miller, Jr. and Mary K. Campbell

All laws "discriminate." To give citizens fair notice of what a statute does and does not permit, a legislature must identify the distinguishing features of the people and activities it is seeking to regulate. For instance, a state may require children under a certain age or weight to be restrained in a child car seat while riding in the family car, yet permit adults to ride without using any safety belt at all. Or a city may require passengers to use headphones if they want to listen to the radio while riding on a city bus, yet put no such restrictions on passengers in private automobiles.

On the other hand, although all laws discriminate, not every instance of discrimination is permissible. Courts will strike down a challenged law if they are unable to find some "rational basis" for the legislature's decision to impose certain restrictions on some people but not on others. And, today, if a legislature were to decide to treat people differently on the basis of what is called a "suspect" classification—such as race—courts would be obligated to declare the resulting law unconstitutional unless they were persuaded that the law is "necessary" and "narrowly tailored" to further some "compelling" state interest. This nearly insurmountable barrier to state-sanctioned racial discrimination was erected by the Supreme Court to reflect the modern understanding of the Fourteenth Amendment's guarantee that all persons are entitled to the "equal protection of the laws."

It is important for students to realize, however, that our present understanding of the strict constitutional ban on virtually any governmental involvement in racial discrimination is far different than the views that often prevailed in the courts right up until the civil rights movement in the middle of this century. The following lesson will help students and teachers begin to examine the rationales that, until fairly recently, were invoked to justify racially discriminatory policies.

Rationale

This lesson will make history come alive for students by engaging them in a moot court analysis of a hypothetical instance of government-sanctioned discrimination. Students then will be asked to look back at our country's World War II internment of Japanese Americans on the West Coast. Having already developed their arguments for the hypothetical case in a modern setting, students will be prepared to compare and contrast their reasoning with that of the United States Supreme Court in the case of *Korematsu v. United States.* The relevance and consequences of that seemingly long-ago case should become clear to students who consider similar issues set in modern times.

Objectives

As a result of this teaching strategy, students will:

- examine the Constitution to determine its applicability and relevance to several cases
- draw conclusions from their investigation which will be presented orally and in writing
- compare and contrast different cases which involve similar issues
- assume the role of either an attorney or a judge during the examination of the cases

Time Needed

From three to six class periods should be allowed for this activity, including:

1-2 class periods to set up the hypothetical case, determine roles and allow time to research the Constitution;

1-2 class periods to present oral arguments and render a decision in the hypothetical case; and

1-2 periods devoted to looking at the Korematsu case in 1944 and 1983.

Materials Needed

A. Student Handout #1: role descriptions of justices and attorneys for students;

B. Student Handout #2: *Lopez v. United States* hypothetical case for every student;

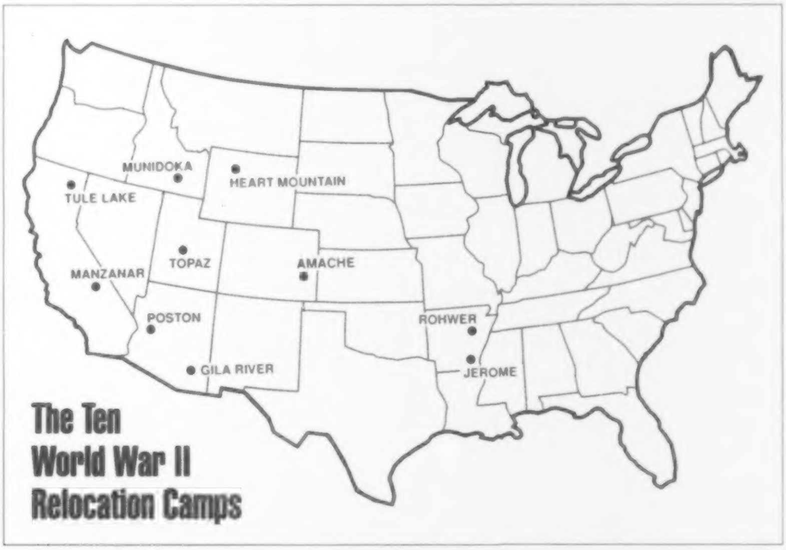
C. Student Handouts #3 & #4: excerpts from 1944 Supreme Court case and 1983 U.S. District Court case, *Korematsu v. U.S.*, and

D. Copies of the U.S. Constitution for each student.

Ellery M. "Rick" Miller is Director and Mary K. Campbell is Assistant Director of the Citizenship Law-Related Education Program for the Schools of Maryland of the Maryland State Bar Association and the Maryland State Department of Education.

Procedure

1. Explain to the class that they will be involved in exploring a Supreme Court case. Select nine students to be justices. Divide the rest of the class into two groups. You may, depending on size, need to further subdivide the groups.
2. Distribute the scenario to each group. The justices should select a Chief Justice and review the role descriptions. You may wish to have them review Article III of the Constitution. The Chief Justice may chose to delegate some duties (selecting a justice to serve as timekeeper, etc.).
3. Assign students to the other groups to serve as the Petitioner's Attorneys and the Respondent's Attorneys. Have each group review their role description on the handout. Their task is to develop an oral argument that will be presented before the Supreme Court. Provide both teams with copies of the *Lopez v. United States* fact pattern and the Constitution.
4. Ask each team to develop an oral argument citing applicable sections of the Constitution. The case study method is a useful model to prepare arguments. This method calls upon students to (1) analyze the facts of the case; (2) determine the constitutional or legal issues that are in question, and (3) develop an argument incorporating the critical facts, the issue, and the laws and/or court precedents that support their position. At the Supreme Court, oral arguments, including questions by the justices, are normally limited to 30 minutes per side. You may wish to further limit the time periods so that both the Petitioner's and Respondent's Attorneys can present oral arguments and the justices can deliberate within one class period. You may also predetermine how many attorneys will actually be involved in the presentation of oral arguments and questioning by the justices.
5. Rearrange the classroom to simulate an appellate courtroom. The nine justices can be seated across the front with a podium, located in the center, facing them. Those attorneys selected to participate in the presentation of the oral arguments can then be seated on the left and right sides, with the remaining students in the back.
6. Supreme Court Session
   Have one member of the Supreme Court call the court to session. The Petitioner's Attorney presents first, with the Respondent's Attorney following. The justices may ask questions at any time or ask the attorneys to consider other related issues. At the end of both presentations, the Chief Justice declares the court to be in recess.



The Ten World War II Relocation Camps

7. Supreme Court Deliberations
   Explain to the class that the justices will now be deliberating *in camera* (in private). This can best be accomplished using a fishbowl format, wherein the justices will deliberate among themselves, stating their positions and following the role descriptions. The remainder of the class can be seated surrounding the justices and may listen and watch but otherwise not interfere. You may wish to set a time limit for deliberation at the end of which the justices should be polled and an opinion rendered. You may also wish to determine whether or not written opinions will be completed as a part of the activity.
8. Debriefing
   Choose one or more of the following options to debrief the activity:
   a. Group Process. Have students return to their three groups and focus on their team effectiveness. The attorney teams can analyze the strengths and weaknesses of their arguments. Did the attorneys selected to represent the larger group articulate the key points that the group wanted to present? The justices can meet at the same time and discuss how they interacted as a group. Were all the justices given ample opportunity to ask questions?
   b. Court's Decision. Have students discuss the Court's decision and consider whether the actual Supreme Court would reach a similar decision if presented with the same case.
   c. Learning Outcomes. Have students identify what they learned from the activity using a "3-2-1" approach, in which students write down three things they learned, two comments on the activity, and one question they have from the case or activity.
9. Explain to students that they are now going to consider the actual case from which *Lopez v. United States* was developed. Distribute and have students read the case. You may wish to compare and contrast the Court's decision.

Student Handout #1

Role Descriptions
Supreme Court Moot Hearing

JUSTICES

Powers and responsibilities:

1. Review the fact pattern of the case and the Constitution to prepare yourself for the presentation of oral arguments. You may wish to develop some questions or issues to present to the attorneys during their arguments.
2. As a member of the court, you may interrupt the presentations of either team of attorneys during the court session to ask a question or to direct the presentation to other issues.
3. Following oral arguments by the attorneys, the court will recess and enter into deliberations. At this point you will discuss the merits of the case. Each justice will be called on by the Chief Justice to express his/her views concerning why the lower court's ruling should or should not be overturned. Your previous analysis of the Constitution is critical during this phase, for you should cite the sections of the Constitution that, in your opinion, support your position. Your goal is to convince the other justices to change their positions to agree with your own. However, if their argument is more persuasive, you need to be prepared to magnanimously change your position.
4. After the case has been discussed fully by the justices, the Chief Justice will take a formal vote and assign the tasks of writing the majority opinion and dissenting opinions, if there are any.
5. You may also be asked by the Chief Justice to give the court's decision and opinion orally to the class once the court has reconvened.

CHIEF JUSTICE

Powers and responsibilities:

1. During the session, in addition to the powers and responsibilities of the other justices, you may extend the time limits of the attorneys' presentations if you or another justice feel it is necessary. Further, you are responsible for the opening and closing of court.
2. Maintain order in the courtroom by insisting that only one individual (with justices receiving preference) speak at any one time and that all statements by the attorneys be directed to the court and not to the attorneys representing the other side in the case. Make sure that each justice has the opportunity to question or raise issues with the attorneys.
3. During deliberations, you are responsible for asking each justice to present his or her views regarding the case without any comments or questions from the other justices.
4. Provide the justices with the opportunity (after everyone has had the opportunity to speak) to question the positions of the other justices and convince the others of the merits of their own views.
5. Take a formal poll of the justices and assign who is to be in charge of writing and presenting orally the court's majority opinion, and the dissenting opinions, if any.

PETITIONER: One who files a petition with a court seeking action or relief. When a petition for a writ of *certiorari* is granted by the Supreme Court, the parties to the case are called "petitioner" and "respondent" (in contrast to the terms "appellant" and "appellee," which are used to describe the parties to an appeal).

PETITIONER'S ATTORNEYS

1. Your courtroom oral argument or brief (written document prepared by counsel supporting their position) should attempt to show one or more of the following:
   - why you think the law involved in the case was not constitutional, citing specific sections or articles to substantiate your claim, and/or
   - why you feel your client did not receive a fair trial, and/or
   - why you feel that the lower court judge or another agent of the law involved in the case exceeded their legal authority.
2. You may cite previous court decisions to support your position.
3. You may use the facts of the case to support your argument.

RESPONDENT'S ATTORNEYS

1. Your oral argument or brief should attempt to refute the issues of fact and law presented by the Petitioner's Attorneys and show that the lower court decided the case correctly.
   - why you think the law involved in the case was constitutional, citing specific sections or articles to substantiate your claim, and/or
   - why you feel the petitioner did receive a fair trial, and/or
   - why you feel that the lower court judge or another agent of the law involved in the case was acting within their legal authority.
2. You may cite previous court decisions to support your position.
3. You may use the facts of the case to support your position.

Student Handout #3

KOREMATSU v. UNITED STATES

Introduction

The December 7, 1941, attack on Pearl Harbor by the Japanese provoked an enormous amount of anger and fear in the United States, particularly on the West Coast. Many feared that an enemy invasion was imminent and that spies and saboteurs were to be found in large numbers in the Japanese-American communities along the coast. Within days of the attack, Japanese Americans began feeling the sting of hostility and fear. Storekeepers and service companies refused to do business with them. Bankers froze their accounts. Mobs attacked and beat them on the streets. For many, life in America suddenly became a nightmare.The culmination of this vitriolic attitude occurred in February 1942 when Lieutenant General John L. DeWitt, commander of the American military defenses on the West Coast, requested that all 112,000 Japanese-American residents be evacuated and relocated away from the Pacific Coast.

DeWitt argued that there was a very real possibility of a West Coast invasion by the Japanese and that the United States had no clear way of knowing where the loyalties of Japanese Americans lay. Hence, the military defense of the nation required their relocation. Government officials were at first skeptical of such a request. Such a wholesale move of a group of citizens for such reasons had not been attempted before. Some raised the question: why are we considering this action toward Japanese Americans, but not toward German Americans or Italian Americans? Was this in part a racially motivated action?

As Washington considered DeWitt's request, more and more public pressure against Japanese Americans arose. Finally, President Franklin D. Roosevelt signed an Executive Order authorizing the Department of War to designate certain portions of the country as war zones "from which any or all persons may be excluded." Congress then passed a law making any violation of that order a criminal offense.

DeWitt proceeded to establish a curfew for Japanese Americans and then a voluntary relocation program. Only about 7 out of every 100 Japanese Americans were relocated under this program. DeWitt then issued an order mandating removal of all Japanese Americans. The War Relocation Agency was hurriedly set up to build camps and supervise the relocation process.

People were given 48 hours to get their affairs in order and to move. Wholesale loss of jobs, homes, and belongings was common. Camps were put together hastily and resulted in very

Student Handout #2*

LOPEZ v. UNITED STATES (1996)

The relative tranquility within the United States was abruptly shattered on July 12, 1995, with the surprise seizure of Guantanamo Naval Base by Cuban troops. The seizure of the base coincided with a three-hour speech by Premier Fidel Castro, who, in a rambling declaration of hostilities, suggested that thousands of Cubans who had emigrated to the United States were in fact loyal to him and prepared to mount terrorist attacks at the very heart of America. Further, Castro demanded 50 billion dollars for what he termed "war reparations" owed Cuba by the United States for the continued enforcement of economic sanctions. Unless the reparations were paid immediately, his alleged terrorist agents would initiate attacks within the continental borders of the United States.

Not since the traumatic bombing of the World Trade Center in early 1993 had America perceived such a threat. Anger, panic, and concern swept the country, provoking great debate as to the potential for terrorist action. This was especially true in the South in general and in Florida in particular. Within days of Castro's speech, Florida's large Cuban-American and Spanish-speaking population began to feel the sting of this hostility and anxiety.

Rumors of an invasion and fear of terrorist attacks were rampant. Lieutenant General Wittde, Commander of the Southern Area Command, requested that all Cuban-American residents be evacuated and relocated away from the Southern coastal areas and from all of Florida. Wittde argued that terrorist attacks or attacks on Cuban Americans were very real possibilities. Further, he declared that the United States had no clear way of knowing where the loyalties of Cuban Americans lay. After increasing public debate and pressure, the President issued an Executive Order which gave military commanders the discretionary authority to designate certain areas of the United States as "military areas." Any or all persons could be excluded and the right to enter, remain in, or leave these areas was subject to whatever instructions the military commanders issued. A Cuban American Relocation Agency was quickly established to build camps and supervise the relocation of all Cuban Americans from Florida. People were given 48 hours to prepare for relocation. The camps rapidly filled to overflowing, burdening the hastily built and inadequate facilities.

Fred Lopez, a native-born American of Cuban ancestry, viewed himself as an American citizen with all the rights and privileges that citizenship entails. When notified of the relocation plan, Lopez decided he would not willingly participate, wanting to remain near his girlfriend. However, he was caught, brought to trial, and convicted. Sentenced to five years probation, Lopez was sent to a relocation camp on the Pennsylvania/New York border.Lopez's attorneys decided to work through the appeals process. In 1996, the U.S. Supreme Court agreed to hear arguments on the case.

** NOTE: This is a hypothetical case created solely for the purpose of exploring legal and constitutional issues. The scenario is entirely fictitious.*

poor living conditions. It is in this context that Fred Korematsu was confronted with a difficult decision. Korematsu was the son of Japanese immigrants who lived in Oakland, California. He was a *nisei* (NEE-say), a term used to describe Japanese Americans born in the United States. Fred, like the 70,000 other *nisei*, was a United States citizen by birth. He had grown up like millions of other American youths. English was his native language. He went to public schools, played on sports teams and generally experienced American culture like other young people. He was an American citizen like his peers with all the rights and privileges that citizenship entails.

December 7 changed all of that for Fred Korematsu and 125,000 other Japanese Americans.When the plan for relocation became public, Fred Korematsu decided he would not willingly participate. He was twenty-two years old, had a non-Japanese girlfriend and firmly believed the relocation order was unconstitutional. He was a loyal citizen who had already attempted to enlist in the military, but had been rejected. Wanting to remain near his girlfriend, he passed himself off as Chinese and hid from authorities. The ruse did not work for long and he was soon arrested and brought to trial. Korematsu's case was defended by the American Civil Liberties Union, a group noted for taking unpopular cases where a civil liberties issue was at stake. He lost his case, *Korematsu v. U.S.*, and was sentenced to five years probation and sent to an internment camp in Utah.

His attorneys decided to work through the appeals process as far as they could. In 1944, the U.S. Supreme Court heard arguments on the case. Korematsu's defense was based in part on the grounds that it was unconstitutional to take people out of their homes and put them into internment camps solely on the basis of race. It was pointed out that other "enemy aliens" had not been treated the same way, i.e., relocated. It was also pointed out that there was no evidence that Korematsu was disloyal. As an American citizen, it was argued, he was entitled to every constitutional right and protection as an individual regardless of his membership in a particular racial group.The government argued that Korematsu and other Japanese Americans were interned under a legal military order. This order was based on a need to secure America's West Coast. Some Japanese Americans were loyal to Japan and therefore constituted a threat to national security. It had become a military necessity to remove all Japanese Americans from a "war zone."

The Supreme Court rendered its decision on December 8, 1944, two and a half years after the evacuation order was given. In a six to three decision, the Court found against Korematsu, 323 U.S. 214 (1944). The majority opinion, written by Justice Black, stated that he was not excluded from the military area because of his race. Rather, it was because we were at war with the Japanese Empire and our national security demanded such measures.

A stinging dissent was authored by Justice Murphy. He referred to this case as an example of "obvious racial discrimination." The mass relocations violated due process of law. While not carrying the day in that Court's decision, Murphy's dissent was an influence on future Court decisions.

Mr. Justice Black delivered the opinion of the Court, saying in part:

> The petitioner, an American citizen of Japanese descent, was convicted in a Federal district court for remaining in San Leandro, California, a "Military Area," contrary to Civilian Exclusion Order No. 34 of the Commanding General for the Western Command, U.S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed, and the importance of the constitutional question involved caused us to grant certiorari.
>
> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.
>
> In the instant case prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942, which provides that "...whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive Order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense."
>
> Exclusion Order No. 34, which the petitioner knowingly and admittedly violated, was one of the number of military orders and proclamations, all of which were substantially based upon Executive Order No. 9066. That order, issued after we were at war with Japan, declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. ..."
>
> One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 P.M. to 6 A.M. As is the case with the exclusion order here, that prior curfew order was designed as a "protection against espionage and against sabotage."
>
> In *Hirabayashi v. United States* (1943), we sustained a conviction obtained for violation of the curfew order. The *Hirabayashi* conviction and this one thus rest on the same basic executive and military orders, all of which orders were aimed at the twin

dangers of espionage and sabotage. The 1942 Act was attacked in the *Hirabayashi* Case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress, the military authorities and of the President, as Commander in Chief of the Army; and finally that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In light of the principles we announced in the *Hirabayashi* Case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is far greater deprivation than constant confinement to the home from 8 P.M. to 6 A.M. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case, the petitioner challenges the assumptions upon which we rested our conclusions in the *Hirabayashi* Case. He also urges that by May 1942, when Order No. 34 promulgated, all danger of Japanese invasion of the West Coast had disappeared. After careful consideration of these contentions, we are compelled to reject them.

Here, as in the *Hirabayashi* Case, "We cannot reject as unfounded the judgement of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have grounds for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgement that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism of those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.

We uphold the exclusion order as of the time it was made and when the petitioner violated it. ...In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. ... But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institution.

But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger. ...It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders as inevitably it must determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot by availing ourselves of the calm perspective of hindsight now say that at the time these actions were unjustified.

Affirmed.

Mr. Justice Frankfurter wrote a concurring opinion. Justice Roberts, Murphy and Jackson each wrote a dissenting opinion.

Adapted with permission from *More Than Mere Parchment Preserved Under Glass: The United States Constitution Cases and Materials*, published by the Citizenship Law-Related Education Program for the Schools of Maryland and the Law, Youth and Citizenship Program of the New York State Bar Association and the New York State Education Department, 1987, pp. 42-45.

Student Handout #4

In 1983, Fred Korematsu, with the help of the American Civil Liberties Union, once again challenged his conviction in the U.S. District Court for the Northern District of California. Judge Marilyn Patel overturned the forty-year old conviction. The judge found that previously withheld government documents demonstrated "that the Government knowingly withheld information from the Courts when they were considering the critical question of military necessity in this case." Judge Patel went on to say that justices of the Supreme Court and legal scholars have commented that the *Korematsu* decision is an "anachronism" that "lies overruled in the court of history."

Fred KOREMATSU, Plaintiff v.
UNITED STATES of America, Defendant
584 F.Supp. 1406 (1984)

(The following are excerpts from the District Court opinion.)

PATEL, District Judge.

Fred Korematsu is a native born citizen of the United States. He is of Japanese ancestry. On September 8, 1942 he was convicted in this court of being in a place from which all persons of Japanese ancestry were excluded pursuant of Civilian Exclusion Order No. 34 issued by Commanding General J.L. DeWitt. His conviction was affirmed. *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

Mr. Korematsu now brings this petition for a writ of *coram nobis* to vacate his conviction on the grounds of governmental misconduct. His allegations of misconduct are best understood against the background of events leading up to his conviction.

On December 8, 1941, the United States declared war on Japan.

Executive Order No. 9066 was issued on February 19, 1942 authorizing the Secretary of War and certain military commanders "to prescribe military areas from which any persons may be excluded as protection against espionage and sabotage."

Congress enacted 97a of Title 18 of the United States Code, enforcing the exclusion promulgated under the Executive Order. Section 97a made it a misdemeanor for anyone to enter or remain in any restricted military zone contrary to the order of a military commander.

In the meantime, General DeWitt was designated Military Commander of the Western Defense Command, which consisted of several western states including California.

On March 2, 1942 General DeWitt issues Public Proclamation No.1 pursuant to Executive Order 9066. The proclamation stated that "the entire Pacific Coast ... is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations."

Thereafter, several other proclamations based upon the same justification were issued placing restrictions and requirements upon certain persons, including all persons of Japanese ancestry. As a result of these proclamations and Exclusion Order No. 34, providing that all persons of Japanese ancestry be excluded from an area specified as Military Area No.1, petitioner, who lived in Area No.1, could not leave the zone in which he resided and could not remain in the zone unless he were in an established "Assembly Center." Petitioner remained in the zone and did not go to the Center. He was charged and convicted of knowingly remaining in a proscribed area in violation of 97a.

It was uncontroverted at the time of conviction that the petitioner was loyal to the Untied States and had no dual allegiance to Japan. He had never left the United States. He was registered for the draft and willing to bear arms for the United States.

In his papers, petitioner maintains that evidence was suppressed or destroyed in the proceedings that led to his conviction and its affirmance. He also makes substantial allegations of suppression and distortion of evidence which informed Executive Order No. 9066 and the Public Proclamations issued under it. While the latter may be compelling, it is not for this court to rectify. However, the court is not powerless to correct its own records where a fraud has been worked upon it or where manifest injustice has been done.

The question before the court is not so much whether the conviction should be vacated as what is the appropriate ground for relief.

THE PETITION FOR A WRIT OF CORAM NOBIS

A writ of *coram nobis* is an appropriate remedy by which the court can correct errors in criminal convictions where other remedies are not available.

While the *habeas corpus* provisions of 28 U.S.C. 2255 supplant most of the functions of *coram nobis*, particularly in light of the federal courts' expanded view of custody, *habeas corpus* is not an adequate remedy here. Petitioner's sentence has been served. It is in these unusual circumstances that an extraordinary writ such as the writ of *coram nobis* is appropriate to correct fundamental errors and prevent injustice.

Coram nobis being the appropriate vehicle for petitioner to seek relief, I turn to the question of how the court shall proceed in this unusual case.

Where, as here, the government offers no opposition and, in effect, joins in similar request for relief, an expansive inquiry is not necessary. In fact, the government agrees petitioner is entitled to relief and concedes: "There is, therefore, no continuing reason in this setting for the court to convene hearings or make findings about petitioner's allegations of governmental wrongdoing in the 1940's."

Ordinarily, in cases in which the government agrees that a conviction should be set aside, the government's position is made clear because it confesses error, calling to the court's attention the particular errors upon which the conviction was obtained. A confession of error is generally given great deference. Where that confession of error is made by the official having full authority for prosecution on behalf of the government it is entitled to even greater deference.

In this case, the government, joining in on a different procedural footing, is not prepared to confess error. Yet it has not submitted any opposition to the petition, although given ample opportunity to do so. Apparently the government would like this court to set aside the conviction without looking at the record in an effort to put this unfortunate episode in our country's history behind us.

The government has, however, while not confessing error, taken a position tantamount to a confession of error. It has eagerly moved to dismiss without acknowledging any specific reasons for dismissal other than that "there is no further usefulness to be served by conviction under a statute which has been soundly repudiated." (R.T. 13:20-22, November 10, 1983). In support of this statement, the government points out that in 1971, legislation was adopted requiring congressional action before an Executive Order such as Executive Order 9066 can ever be issued again; that in 1976, the statute under which petitioner was convicted was repealed; and that in 1976, all authority conferred by Executive Order 9066 was formally proclaimed terminated as of December 31, 1946. While these are compelling reasons for concluding that vacating the conviction is in the best interest of this petitioner, respondent and the public, the court declines the invitation of the government to treat this matter in the perfunctory and procedurally improper manner it has suggested.

Because the government has not acknowledged specific errors, the court will look to the original record and the evidence now before it to determine whether there is support for the petition and whether manifest injustice would be done in letting the conviction stand.

THE COMMISSION REPORT

The Commission on Wartime Relocation and Internment of Civilians was established in 1980 by an act of Congress. It was directed to review the facts and circumstances surrounding Executive Order 9066 and its impact on American citizens and permanent resident aliens, to review directives of the United States military forces requiring the relocation and in some cases, detention in internment camps of American citizens, including those of Japanese ancestry; and to recommend appropriate remedies.

The Commission was composed of former members of Congress, the Supreme Court and the Cabinet as well as distinguished private citizens. It held approximately twenty days of hearings in cities across the United States, taking the testimony of over 720 witnesses, including key government personnel responsible for decisions involved in the issuance of Executive Order 9066 and the military orders implementing it. The Commission reviewed substantial numbers of government documents, including documents not previously available to the public.

The findings and conclusions of the Commission were unanimous. In general, the Commission concluded that at the time of the issuance of Executive Order 9066 and implementing military orders, there was substantial credible evidence from a number of federal civilian and military agencies contradicting the report of General DeWitt that military necessity justified exclusion and internment of all persons of Japanese ancestry without regard to individual identification of those who may have been potentially disloyal.

The Commission found that military necessity did not warrant the exclusion and detention of ethnic Japanese. It concluded that "broad historical causes which shaped these decisions [exclusion and detention] were race prejudice, war hysteria and a failure of political leadership." As a result, "a grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II."

The Commission's Report provides ample support for the conclusion that denial of the motion would result in manifest injustice and that the public interest is served by granting the relief sought.

CONCLUSION

The Supreme Court has cautioned that *coram nobis* should be used "only under certain circumstances compelling such action to achieve justice" and to correct "errors of the most fundamental character." It is available to correct errors that result in a complete miscarriage of justice and where there are exceptional circumstances.

The Court observed that due process principles raised by *coram nobis* charging prosecutorial misconduct, are not "strictly limited to those situations in which the defendant has suffered arguable prejudice, [but also designed] to maintain public confidence in the administration of justice."

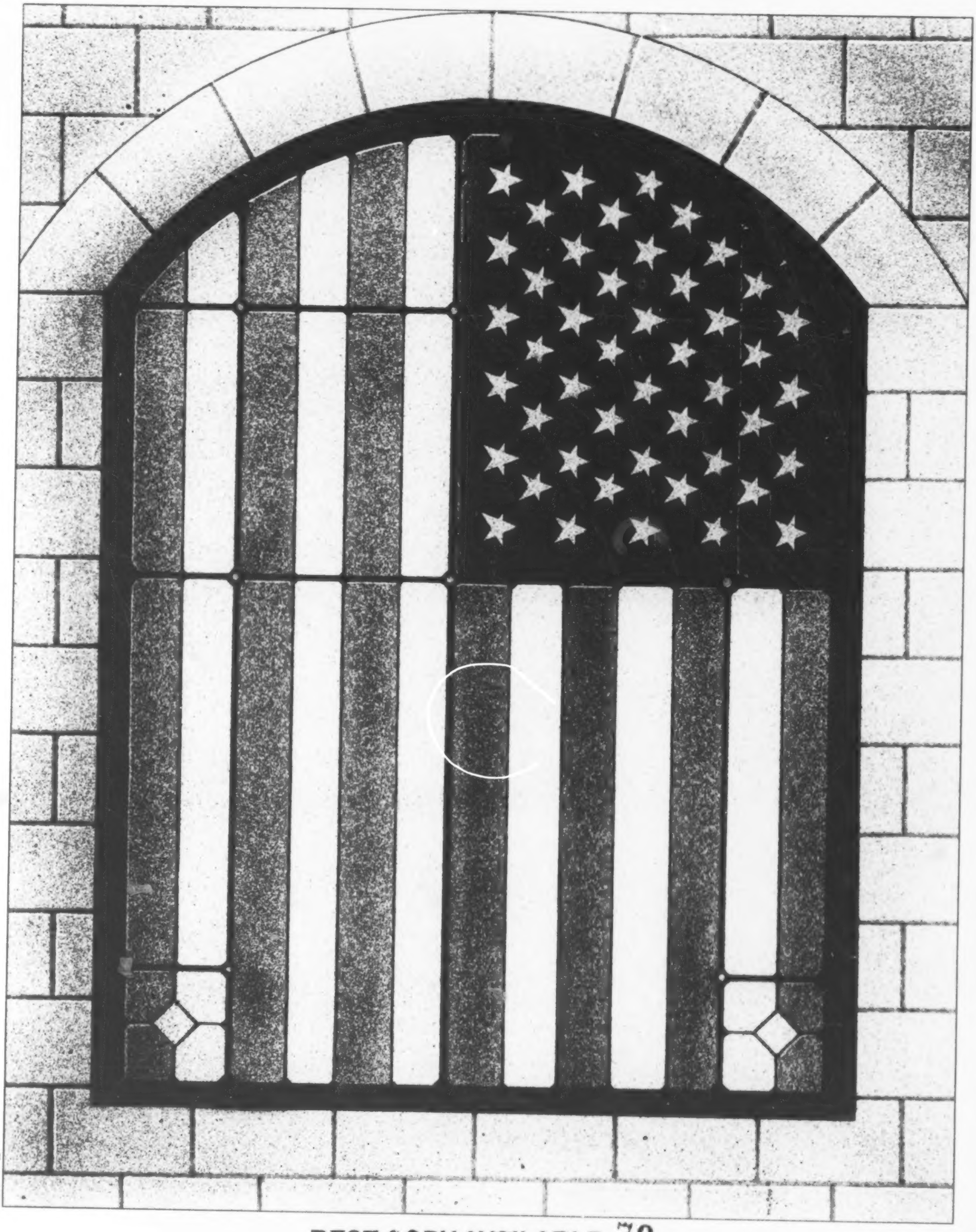
The government acknowledged its concurrence with the Commission's observation that "today the decision in *Korematsu* lies overruled in the court of history."

Korematsu remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees.

It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive, and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.

ORDER

In accordance with the foregoing, the petition for a writ of *coram nobis* is granted and the counter-motion of the respondent is denied.



Tony Griff

BEST COPY AVAILABLE

Law and U.S. History

Religious Liberty as American History

Vincent Martin Bonventre

The history of America is largely the history of liberty—of "Free Government in The Making," to borrow the title of the late Princeton Professor Alpheus T. Mason's anthology of historic American documents. The struggle against oppression and the safeguarding of individual rights, however halting and painful at times, are the most prominent and momentous themes of this nation's more than two hundred years of existence.

The history of religious freedom, in particular, is revealing. That liberty is a—if not the—"first freedom." (*See* Curry, *The First Freedoms: Church and State in America To the Passage of the First Amendment* (1986)) Not only is it the reason so many of our ancestors came to America, but it is absolutely essential to our form of government, critical to how we view ourselves, and perhaps more than any other attribute of a free society, definitive of what Americans mean by freedom itself—i.e., freedom to entertain one's own beliefs and opinions about the things that matter most, and to conduct one's own life and family's life in accordance therewith. It is hardly surprising, then, that religious liberty is the very first freedom guaranteed in the Bill of Rights to our Constitution.

The first words of the First Amendment forbid any government laws or actions "respecting an establishment of religion or prohibiting the free exercise thereof." The development, application and continuing evolution of that constitutional dictate is a common thread through American history. Each era in American history contains corresponding events in the history of religious liberty. In fact, it is not too much of an exaggeration to say that American history can be viewed fairly accurately through the lens of freedom of religion.

At the least, the development of the American law of religious liberty reflects American history generally. All the significant events and controversies that mark the history of religious freedom in this country arose, of course, in the context of the times. Those events and controversies thus provide good illustrations of what America was doing, thinking and enduring during those times—they often provide a good deal of insight as well.

The purpose here is to show how religious liberty—specifically, developments in the law of freedom of religion—helps to define American history. Religious liberty can be used as a perspective from which to view American history generally; or it can be approached as one integral part of that history. For each of the several broad historical periods identified in this article, a few significant developments in the law of religious liberty have been chosen. These seem to reflect or illustrate the tensions between government interests and individual rights that marked the times. While little more than a few isolated sketches are possible here, I hope these will prove useful for the classroom and will help to suggest other possibilities.

Defining the Nation

The Declaration of Independence proclaimed: "We hold these truths to be self evident; that all men are created equal; that they are endowed by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." Though the Declaration did not catalogue the "unalienable rights" referred to or attempt to define the content of "liberty," there could be no doubt that freedom of religion was included. Indeed, Thomas Jefferson made clear the next year, when he drafted "A Bill for Establishing Religious Freedom" in Virginia, just how "unalienable" and indispensable to free society he believed religious liberty to be. Jefferson's bill, as originally introduced in the Virginia legislature two years later, provided:

> Well aware that the opinions of men depend not on their own will, but follow involuntarily the evidence proposed to their minds; that *Almighty God hath created the mind free, . . . that the opinions of men are not the object of civil government*, nor under its jurisdiction;

Vincent Martin Bonventre is Assistant Professor of Law at Albany Law School, Union University. He wishes to acknowledge the invaluable research assistance of Albert A. Zakarian.

> that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the professional propagation of principles, on supposition of their ill tendency is a dangerous fallacy which at once destroys all religious liberty . . .; that it is time enough for the rightful purpose of civil government for its officers to interfere when principles break out into overt acts against peace and good order . . . [Emphasis added.]
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> The General Assembly, do enact, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall *otherwise suffer on account of his religious opinions or beliefs; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion,* and that the same in no wise diminish, enlarge, or affect their civil capacities. [Emphasis added.]

It has been said that "If the Declaration of Independence was a declaration against political tyranny, [Jefferson's Bill] of Religious Freedom may be called the correlative Declaration against the suppression of free mind and conscience." (Plochl, "Thomas Jefferson, Author of the Statute of Virginia for Religious Freedom," 3 *Jurist* 182, 219 (1943)) Harvard historian Bernard Bailyn has gone so far as to describe Jefferson's bill as "the most important document in American History, bar none." (As quoted in Dreisbach, "A New Perspective on Jefferson's Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in Its Legal Context," 35 *Am. J. Legal Hist.* 172, 184 n. 68 (1991)) Moreover, the Supreme Court has long considered the "Virginia Struggle" for religious liberty—which culminated in the enactment of Jefferson's bill in 1786—to be authoritative in determining the meaning of freedom of religion in the United States Constitution, and thus, for the entire nation. (*See e.g., Reynolds* v. *United States*, 98 U.S. 145, 162-164 (1878); *see generally*, cases cited in Adams & Emmerich, "A Heritage of Religious Liberty," 137 *U. Pa. L.Rev.*, 1559, 1572 n. 54 (1989))

The Virginia State Constitutional Convention of 1776 passed a Declaration of Rights which guaranteed religious freedom. (See generally, for discussion of the "Virginia Struggle," T. Buckley, *Church and State in Revolutionary Virginia*, 1776-1787 (1977)) Drafted by George Mason and James Madison, it provided:

> That religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore *all men are equally entitled to the free exercise of religion, according to the dictates of conscience*; and that it is the mutual duty of all to practice Christian forbearance, love, and charity toward each other. [Emphasis added.]

Despite that guarantee of religious liberty, there were attempts in Virginia to reinstate a hitherto suspended tax, imposed upon all, to pay the salaries of Anglican ministers. After such efforts failed, a bill was introduced into the state legislature in 1784 which would have imposed a similar tax to support all *Christian* ministers, allowing each taxpayer to designate the recipient church. Madison, however, a vehement opponent of such a tax, was able to postpone final voting until the legislature next convened. In the meantime, he published his *Memorial and Remonstrance Against Religious Assessments*, condemning the tax as a dangerous abuse of governmental power that violated the inalienable right to choose whether to support any religion and which one to support. Madison asserted:

> We remonstrate against the said Bill . . . The Religion . . . of every man must be left to the conviction and conscience of every man; and *it is the right of every man to exercise it as these may dictate.* That right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, can not follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. *It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.* This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. [Emphasis added.]

Madison's *Memorial and Remonstrance* was widely distributed before the Virginia legislature reconvened. He thus generated such opposition to the proposed tax that it died without a vote. Encouraged by this victory, Madison reintroduced Jefferson's Bill for Establishing Religious Freedom, which had failed to pass in the preceding several legislatures. With somewhat revised prefatory language, and Madison's expert political guidance, the bill was enacted into law.

Three years later, James Madison lead the First Congress of the federal government in drafting a Bill of Rights, including the religion clauses of what ultimately became the First Amendment. The meaning Madison intended for those provisions can be gleaned from his role in the "Virginia Struggle." His fellow Virginian, Thomas Jefferson, had opportunity to comment shortly thereafter. Refusing as president, in 1802, to declare a national day of fasting and thanksgiving, because he believed the federal government must remain uninvolved with religion, Jefferson wrote in his famous letter to the Danbury Baptists:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declare that their legislature should "make no law respecting an establishment of religion, or prohibiting the free

exercise thereof," *thus building a wall of separation between Church and State*. [Emphasis added.]

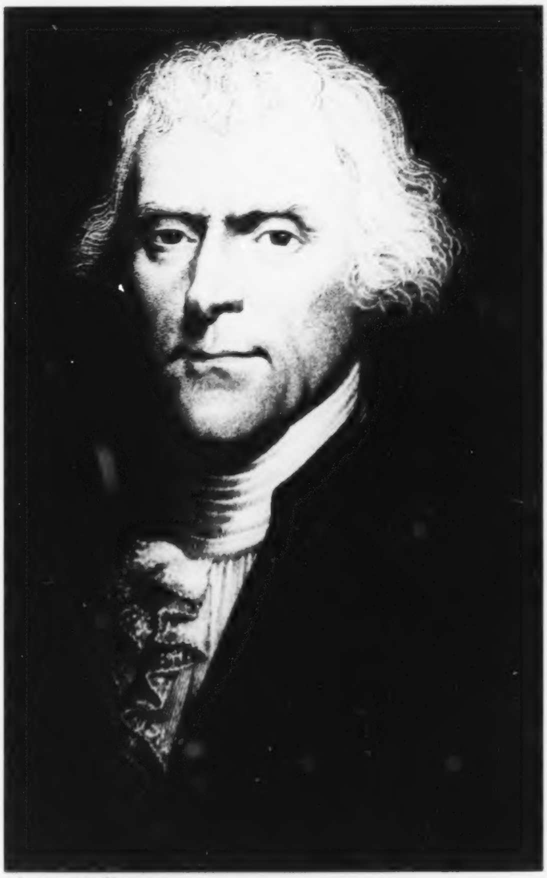
Thus, one "unalienable right" was given context and meaning in Virginia. More than that, context and meaning was likewise given to a founding principle of this nation—religious liberty specifically; but more generally, the notion that government's proper reach over the individual is limited and can never extend to ideas, beliefs, opinions, and their peaceable manifestations. The following sections will illustrate how this notion has been applied to difficult questions facing the country at different times in its later history.

Westward Expansion

If America's march west entailed atrocious mistreatment of Native Americans, it likewise was not always kind to religious minorities, many of whom had fled to the West to escape religious persecution in the East. The Northwest Ordinance of 1787 had been a propitious beginning. Enacted prior to the ratification of the Constitution, it dictated a bill of rights for the governments in the Northwest Territory, in order to extend "the fundamental principles of civil and religious liberty, which formed the basis whereon these republics, their laws and constitutions are erected." Its first article declared that "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments in the said territory." But this promise of religious liberty was not to be enjoyed by all who ventured west.

In particular, the treatment of the Mormon religion was shameful. As Philip Kurland shows in *Religion and the Law: Of Church and State and the Supreme Court* (1961), hounded by hostility and persecution in the East and Midwest, the Mormons fled to Utah. In the 1860s, Congress, exercising its authority over the territory, enacted laws directed at the Mormons, specifically prohibiting polygamy. The Supreme Court's first serious religious case, *Reynolds v. United States*, 90 U.S. 145 (1878) was a criminal prosecution raising the question whether that prohibition could be constitutionally applied to a Mormon.

The Court rejected Reynolds' contention that polygamy, being a practice of his religion, was protected by the First Amendment. "Polygamy has always been odious among the northern and western nations of Europe,"' the Court noted, "and, until the establishment of the Mormon church, was almost exclusively a feature of the life of Asiatic and African people." That apparently being sufficient reason to justify the prohibition, the Court also explained that while Congress had no authority over mere opinion, it could regulate any "actions in violation of social duties and subversive of good order." And that, in the Court's view, certainly covered the Mormons' practice of polygamy.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Thomas Jefferson

Likewise, in *Davis v. Beason*, 133 U.S. 333 (1890) decided several years later, the Supreme Court upheld a statute of the Idaho Territory that conditioned the right to vote on the denial of membership in any organization that taught or encouraged polygamy. In short, it required Mormons either to lie or to renounce their religion in order to be eligible to vote. The Court rejected the argument that the statute unconstitutionally created a religious test for voting that penalized Mormons. "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries," the Court said. "To call their advocacy a tenet of religion is to offend that common sense of mankind."

Thus the Court denied the *bona fides* of a minority religion, and thereby, denied the blessings of religious liberty to all its members. Although the Constitution was supposed to guarantee protection for all religious beliefs, and for all peaceable religious actions as well, in the Mormon cases it utterly failed in the Court's hands to provide either. The Court, and the nation, in their intolerance toward the Mormons' uncommon opinions and practices of conscience, refused even to acknowledge that they were religious, and, therefore, worthy of some constitutional protection from religious persecution. While the Court may well have been right in outlawing polygamy, it was certainly wrong to disregard totally the rights of members of a minority religion, and to refuse to recognize that the burdens placed on those members warranted scrupulous First Amendment scrutiny. (For more on the Mormon experience, see Laycock, "A Survey of Religious Liberty in the United States," 47 Ohio St. L.J., 409, 416-417 (1986); for a discussion of the Catholic experience, see Stokes, *Church and State in the United States*, 784-853 (1950).)

Times of War

Individual liberty is not suspended when the nation is at war. But often in our history, it has been subordinated to perceived needs of the national defense. Freedom of religion is no exception. On issues implicating preparedness for war and service or allegiance to the country in times of crisis, the constitutional guarantee of religious liberty has been put to the test.

During the world wars, the collective national interest in survival sometimes intruded upon individual freedom of religion; and yet on other occasions, the nation's constitutional commitment to liberty of conscience prevailed. But always, a line had to be drawn between liberty and duty to country. And that line has been particularly difficult to draw in wartime. (See, Abraham, *Freedom and the Court*, 5th ed. (1988).)

In its 1931 decision in *United States v. Macintosh*, 283 U.S. 605 (1931) the Supreme Court upheld the denial of citizenship to a Canadian Baptist minister, a chaplain at Yale University, because he refused an oath to take up arms for the country when called. The Court explained:

> We are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God. *But, also, we are a nation with a duty to survive;* a nation whose Constitution contemplates war as well as peace; whose government must go forward on the assumption, and safely can proceed on no other, that unqualified allegiance to the nation and submission and obedience to the laws of the land, as well as those made for war as those made for peace, are not inconsistent with the will of God. [Emphasis added.]

By the time of *Macintosh*, the constitutional status of conscientious objection to military service had not changed since the Supreme Court first confronted the issue thirteen years earlier. At that time, in the *Selective Draft Law* cases, 245 U.S. 366 (1918), the Court, summarily dismissed any religious liberty challenge to the conscription law. "And we pass," the Court said, "without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment [has] resulted . . . because *we think its unsoundness is too apparent to require us to do more*." [Emphasis added.]

The Court's opinion, devoid of legal authority or reasoning, is understandable, if at all, only as a product of the time—the height of the nation's participation in World War I. Later, in 1934, as the Nazis and Hitler were coming to power in Germany, the Court's decision in rejecting another claim for religious exemption was somewhat better reasoned.

In that case, *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934), college students belonging to the Methodist Episcopal Church and having conscientious scruples against military service, requested exemption from the mandatory ROTC classes at the university. When their requests were refused, they absented themselves from the military classes and were expelled. They argued at the Supreme Court that their constitutional right of religious freedom was violated because they were being penalized for their convictions.

Rejecting their claim as "untenable," the Court said:

> Government, Federal and State, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of the law. And every citizen owes a reciprocal duty, according to his capacity, to support and defend the government against all enemies.

The concurring opinion, authored by Justice Benjamin N. Cardozo, while agreeing that the students' religious liberty was not impermissibly infringed, offered an additional rationale. A different decision in the case, Cardozo explained, would lead to untoward practical and logical consequences:

> [A] different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment had never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.

But the freedom of religion has not always been a loser to governmental wartime interests. The story of the *Flag Salute Cases* is a prime illustration. (See, for an excellent discussion, Abraham, *Freedom and the Court*, 5th ed. (1988), pp 300-306. In the first, the 1940 case of *Minersville v. Gobitis*, 310 U.S. 586 (1940), the Court had upheld a school district requirement that all students salute the national flag as part of a daily patriotic exercise. The Gobitis children, members of the Jehovah's Witnesses, were expelled for refusing to salute on religious grounds. For them, saluting a flag was tantamount to worshiping a "graven image," a mortal sin in violation of their biblical teaching. For the Court, however, compulsory flag saluting was justified; it represented "an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security."

A mere three years later, the Court

reversed itself. In *West Virginia v. Barnette*, 319 U.S. 624 (1943), partly as the result of the publicly announced change of view of several of the justices (*See, Jones v. Opelika*, 316 U.S. 584, 623 (1942)), the Court there held that a government-compelled flag salute "transcends constitutional limitations . . . and invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control." The Court upheld the conscientious objection of Jehovah's Witnesses to participate in any show of allegiance to any worldly thing or person; it thus protected their right to refuse to salute the flag, despite the acknowledged governmental interest in fostering national unity, especially in time of war.

The Court, speaking through Justice Robert H. Jackson, concluded with one of the most memorable lines in its history:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

In time of war, no less than in time of peace, the Constitution guarantees Americans their fundamental rights. Protection of those rights is, to be sure, sometimes more difficult and complicated in times of crises, and may even have to bend to accommodate overriding national interests in defense and survival. For the teacher and student, there is no dearth of case law illustrating how these rights and interests have been balanced during such times.

Recent Years

Recent American history has been a pendulum. The last few decades swung from the civil rights revolution and the sixties rebellion to the pursuit of greater social and economic stability. Emphasis on personal freedoms gave way to the desire for greater government efficiency.

The law of religious liberty was on the same pendulum. In the sixties and early seventies, freedom of religion was expanding; its protections were strengthened and its reach extended. Since then, however, the Supreme Court has been cutting back. Instead of siding with the individual, the Court began increasingly to favor government, and to be less likely to sustain claims of religious freedom violation. A few cases—decided on both sides of the pendulum's swing—will illustrate the point. They also reflect some of the major changes in public policy generally, that have occurred in recent American history.

Early in the 1960s, in *Torasco v. Watkins*, 367 U.S. 488 (1961) the Supreme Court interpreted the First Amendment to protect not only religion, but irreligion as well. There, an applicant for the office of notary public in Maryland was denied that position for refusing to take a state-required oath declaring belief in God. The Court agreed with him that the oath requirement violated his constitutionally guaranteed free exercise of religion. Specifically, the oath impermissibly burdened the freedom of belief of nonbelievers.

The Court noted that many religions practiced in this country—e.g., Buddhism, Taoism, and Secular Humanism—do not include what is typically viewed as a belief in God. The Court made clear that such a belief could not be imposed by government, whether as a legal requirement or as a qualification for a privilege:

> [N]either a state nor the federal government can constitutionally force a person to profess a belief or disbelief in any religion. Neither can constitutionally pass laws nor impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs . . . The fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution.

Two years later, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court extended the *Torasco* rationale for qualifications for public office to conditions for public benefits. There, a Seventh Day Adventist had been denied unemployment compensation when she refused, on account of religious conviction, to accept work on Saturday, her sabbath. Because the state government had no compelling reason to refuse to accommodate the Sabbatarian's beliefs, the denial of unemployment benefits was held to constitute an illegal penalty on her exercise of religion. The Court explained:

> The [denial of unemployment compensation] forces her to chose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Finally, in its 1972 decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court went further yet, and required an exemption to a criminal statute to accommodate the Amish religion. There, the Court held that the state's interest in requiring high school attendance was not sufficiently strong to override the Amish conviction against sending children to school beyond the eighth grade where, they feared, the children would be exposed to "worldly values" anathema to their religion. The survival of the Amish religion and way of life, the Court concluded, demanded a constitutional exemption for the Amish from the otherwise generally applicable criminal law prohibiting truancy.

But that was the sixties and early seventies. Thereafter, the country and the administration in Washington became increasingly "conservative"—i.e., increasingly concerned about general stability and order. Religious liberty, at least as interpreted by the Supreme Court, changed correspondingly. The decisions of the Justices then sitting on the Court tended to reflect the more conservative views for which they were, in general, selected by the more conservative presidents of the time. An emphasis on protecting individual rights was, thus, replaced by a heightened support for governmental or societal interests.

Hence, ten years after *Yoder*, in *United States v. Lee*, 455 U.S. 252 (1982), the Court rejected the claim of Amish employers that they were constitutionally entitled to an exemption from paying Social Security taxes. Although the Amish objection to participating in the Social Security program was religiously based, the Court held that the government's need for uniformity in the collection of taxes was sufficiently great to justify denying a religious exemption. Exempting the Amish would "unduly interfere" with the government's interest, the Court said, because future exemptions might then be required for other groups. Whatever the merits of that argument, similar ones had previously been rejected by the Court, albeit in different contexts, in *Sherbert* and in *Yoder*.

Four years later, in the 1986 case of *Goldman v. Weinberger*, 475 U.S. 503 (1986), the Court upheld an Air Force dress code which precluded an Orthodox Jewish rabbi and military officer from wearing his yarmulke with the uniform. In denying an exemption he requested on religious liberty grounds, the Court relied upon the military's need for uniformity. The military must be free "to foster instinctive obedience, unity, commitment, and esprit de corps," held the Court. Unlike in *Sherbert* and *Yoder*, the government's assertion of a compelling interest—which could not withstand any religious exemptions—was accepted as true with little scrutiny.

More recently, in *Oregon v. Smith*, 494 U.S. 872 (1990), freedom of religion under the Constitution was brought full circle, back to before its vigorous protection by the Supreme Court, stripped of its status as a near-inviolable right that could be infringed only where government purposes of the highest order could not otherwise be achieved. But such "compelling government interests" were deemed no longer necessary in *Smith*. Unless some other constitutional right is implicated in addition to religious liberty—e.g., free speech as in *Gobitis* (the second flag salute case), or parental rights over their children's education as in *Yoder*—the free exercise of religion must give way to any otherwise legitimate law.

Hence, the Court in *Smith* held that the First Amendment did not prevent the application of Oregon's criminal drug laws against Native Americans who use peyote in church ceremonies. Although the Native Americans had used peyote as a central part of their religious worship for centuries, the Court held that they had no constitutional right to an exemption from the state's criminal prohibition. The Court reasoned that:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. . . . To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling[,] permit[s] him, by virtue of his beliefs, to become a law unto himself.

The Court thus diluted significantly the protection of religious liberty which it had earlier insisted upon. To be sure, persuasive arguments might well be made that the Oregon drug laws served a compelling government interest whose effective promotion permitted no exemptions. But that is much different than arguing that the inalienable right of freedom of religion should be fair game for infringement whenever government decides to prohibit conduct it deems harmful, regardless how critical or not that prohibition might be, and regardless how innocuous it would be to permit a religious exemption.

A noted scholar has commented that, "*Smith* [represents] the near total loss of any substantive constitutional right to practice religion." (*See* Laycock, Summary And Synthesis: The Crisis In Religious Liberty, 60 Geo. Wash L.Rev. 841, 848 (1992)) One need not fully share that pessimism to recognize that the contours of constitutionally guaranteed religious liberty have changed with the times. Especially in the past decade, when the country grew more "conservative"—more pro-established order and pro-mainstream—the First Amendment protections afforded to individuals and minority religions were narrowed. The Supreme Court's concept of religious liberty was a reflection, as well as a part of, the history of America that was made during those years. But that is how it has been from the beginning.

Conclusion

As American history has been made, so has been the history of freedom of religion. The development of First Amendment law, safeguarding religious beliefs and worship—more in some periods, less in others—is one of the common threads that ties our nation's history together. The balancing of rights and responsibilities, the drawing of lines between individual freedom and governmental authority, and the pushing and pulling of civil liberties and societal interests—these have been an integral part of American history.

In the past few decades alone, there have been historic changes in this country, and similar ones in the law of freedom of religion. In the years to come, with the current change of the guard in Washington, and with the changes that will surely come again, American history will be made. It will be made in politics, economics, science, the arts, and in so many other areas—including the law of religious liberty.

Teaching Strategy

Disability Legislation and Civil Rights: Contemporary Issues and Historical Background

Wanda J. Routier, Aggie Alvez and Jeffrey Chinn

Objectives

As a result of this lesson, students will be able to:

- analyze legislation prohibiting discrimination against individuals with disabilities;
- compare the Americans With Disabilities Act of 1990 with civil rights legislation from the 1960s and 1970s;
- discuss the historical development of nondiscrimination laws for, and attitudes about, individuals with disabilities; and
- conduct a moot court hearing on a First Amendment case involving a student who is deaf.

Background

On July 26, 1990, the Americans with Disabilities Act (ADA) was signed into law by President Bush. Hailed as the "Emancipation Proclamation for those with disabilities," this landmark legislation prohibits discrimination against individuals with physical or mental disabilities in the areas of employment, public services, public accommodations, and telecommunications.

Public awareness of, and sensitivity to, individuals with disabilities increased significantly as a result of World War II. Why did this happen? Prior to the end of the war in 1945, people with disabilities and disease were often either cloistered in state institutions, or were kept at home with their families out of public view. Due to life-saving medical advances achieved during the war, however, greater numbers of veterans than in previous wars were returning home alive, but with disabilities.

After World War II, Americans began to change the way they viewed people with disabilities. For instance, in the Academy Award-winning film of 1946, *The Best Years of Our Lives*, a double amputee World War II veteran, Harold Russell, played a similar character returning to civilian life as a disabled person. The film, for which Russell won a Best Supporting Actor Oscar, increased public awareness of the circumstances of disabled veterans. After the war, opportunities for rehabilitation and vocational training increased for disabled veterans. In 1947 President Truman established the President's Committee on Employment of the Handicapped, a committee still in existence today as the President's Committee on Employment of People with Disabilities. The high public visibility of disabled war veterans encouraged awareness of and sensitivity to the needs of other people with disabilities.

In the early 1950s, a large number of Korean war veterans once more returned home to the United States with able minds but disabled bodies. The single most important historical event affecting issues of employment discrimination and people with disabilities, however, was the Vietnam War in the 1960s and early 1970s. Through the power of television, Americans viewed graphic pictures of soldiers with severe disabilities. Unlike the veterans of previous American wars, however, Vietnam veterans were not regarded as returning heroes. Fueled by anger and guilt, many disabled veterans fought for acceptance into mainstream society.

By the 1970s federal programs existed to provide training and support for veterans with disabilities. These programs, however, did not apply to nonveterans. In 1973, Congress passed the Rehabilitation Act, extending protections against discrimination to all individuals "under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." In 1975 the Individuals with Disabilities Education Act (IDEA) was passed, providing rights for students with disabilities. In 1990, after years of effort, the Americans with Disabilities Act was passed.

Wanda J. Routier is Program Director of LRE for Students with Disabilities at the National Institute for Citizen Education in the Law; Aggie Alvez is Program Director for the National Schools Program at NICEL; Jeffrey Chinn is Program Director for the D.C. Street Law Diversion Program.

Lesson Timeframe

Allow three class periods to complete all of the elements of this lesson.

Procedure

1. Brainstorm definitions of "disability" with students.
   Note: The Americans With Disabilities Act of 1990 (ADA) defines a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of an individual." (Sec. 3, [2]). Unlike previous major related legislation, including the Rehabilitation Act of 1973 (29 U.S.C.A. 706), the ADA refers to individuals with "disabilities," rather than "handicaps." Ask students why they think the terminology has been changed. Do they think it makes a difference? Ask them to name some conditions they believe constitute "disabilities." Ask students to discuss what they know about the struggle for independence and access of people with disabilities. The following questions may aid the discussion:
   a. Can people with disabilities attend your school? (issues to consider: wheelchair accessibility, access to the school bus, access to lockers, locker rooms, bleachers, football field, band room, videotapes in classroom—are they captioned for students who can't hear, are books provided in Braille for students who cannot see, etc.).
   b. Have you ever seen a person with a disability at school, at a sports event, at the mall, or working at a job? Ask students who answer "yes" to describe their encounter.
   c. Have people with disabilities always been able to have a job or attend school? The answer to this question is "no." In the past, people with disabilities were typically limited in the scope of their participation in everyday life. Many children who were diagnosed with a disability were sent away to a state-run residential school where they lived and attended school.

Student Handout #1

Laws Protecting Individuals with Disabilities

Rehabilitation Act of 1973 Nondiscrimination under Federal Grants and Programs:

Under the Rehabilitation Act, "no otherwise qualified individual with handicaps in the United States ... shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." The Rehabilitation Act was approved by Congress on September 26, 1973. It has been amended in 1978, 1986, 1988, and 1992.

Individuals with Disabilities Education Act (IDEA), 20 U.S.C. section 1400(a) (Supp. III 1991)

This act was originally known as the Education of the Handicapped Act. Its purpose is "to assist States and localities to provide for the education of all children with disabilities." Under the IDEA, local school districts must provide the following for students with disabilities: A "free and appropriate public education" or FAPE. Students with disabilities can go to school from birth to age 21 without paying any extra money for classes.

The student must be in a class in the "least restrictive environment." A student must be sent to a school that provides a class that is best for that student.

Each student with a disability must have an "individualized education plan" or IEP. The teacher and parent/guardian must write a plan that tells what the student will learn during the school year and what other services the student will receive (e.g., speech services, an interpreter, a typewriter or Braille books). All parties must agree to the plan and sign off on it. Any changes must be approved by the parent/guardian. If the parent/ guardian does not agree with any changes in the plan, he or she can request a hearing. Under the law, students with disabilities also have the right to be "mainstreamed" (included in a class or school with students who are not disabled).

The Supreme Court has also ruled, in *Honig v. Doe*, 484 U.S. 305 (1988), that school officials cannot unilaterally suspend or expel disabled students from class for dangerous or disruptive behavior, as this would violate the IDEA's "stay-put" provision. This case established due process rights for such students.

A ruling by the U.S. Department of Education has interpreted the IDEA as requiring that a school district make benefits available to students in private schools on a basis "comparable in quality, scope, and opportunity for participation to the program benefits that the [school district] provides for students enrolled in public schools." Federal regulations expressly authorize school districts "to use program funds to make public personnel available" in private schools, but prohibit federal funding for "[r]eligious worship, instruction, or proselytization."

Under the IDEA, a disabled student is defined as having one or more of the following conditions:

> "...mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional dis-

turbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities;" and "[needing] special education and related services" (such as speech interpreters, Braille books).

The Americans with Disabilities Act of 1990 (ADA)

Prohibits discrimination against individuals with disabilities in the following areas:

- employment
- public services
- public accommodations and services operated by private entities
- telecommunications

The ADA provides that "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual." There are three qualifying criteria for a "disability": (1) a physical or mental impairment that substantially limits a major life activity of an individual; (2) a record of such an impairment; and (3) being regarded as having such an impairment.

A selected glossary of additional ADA definitions and terms:

Reasonable Accommodation. The ADA defines "discrimination" as including "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual ... unless such covered entity can demonstrate that the accommodation would impose an undue hardship...." "Reasonable accommodations" include making existing facilities readily accessible, restructuring jobs, acquiring or modifying equipment or devices, modifying examinations or training materials, and providing readers or interpreters. Courts have also ruled that discrimination against individuals with disabilities is permitted if it is demonstrated that they constitute a significant risk to the health or safety of others, which cannot be removed by reasonable accommodation.

Qualified Individual with a Disability. An individual with a disability who has the "requisite skills, experience, and education requirements ... and who, with or without reasonable accommodation, can perform essential functions...."

Undue Hardship. An action requiring "significant difficulty or expense" in the context of the resources of a facility and the overall impact of the accommodation. In the area of employment discrimination, the ADA places the burden on employers to prove that an accommodation would constitute an undue hardship.

Essential Job Functions. The ADA distinguishes between "essential" and "secondary" or "nonessential" job functions. If a person with a disability can perform all necessary essential functions of a job, employers may not discriminate against that individual on the basis of his or her inability to perform other nonessential functions. "Essential" job functions include those for which the job exists to perform or is a specialization critical to the job.

Public Accommodations. Typically refers to business establishments, whose operations involve interstate commerce or are supported by government action, which are open to the public and provide lodging, entertainment, food or other services.

Medical Condition. In the area of employment discrimination, the ADA prohibits employers from making decisions about hiring, firing or promotions based on employees' medical condition, unless the medical condition interferes with job performance.

Comparing the Rehabilitation Act of 1973 and the ADA

Rehabilitation Act of 1973

- is still law
- limited scope of protection (applies to federal government, federal contractors and other programs/activities receiving federal funds)
- has affirmative action components

Americans With Disabilities Act of 1990

- does not repeal Rehabilitation Act
- term "disability" replaces, but defined much the same as, "handicap" under Rehabilitation Act
- provides protections similar to Rehabilitation Act, but has broader scope (covers entities subject to Title VII of the Civil Rights Act of 1964, which prohibits discrimination against individuals on the grounds of race, color, religion, sex, or national origin)
- unlike the Rehabilitation Act, the ADA establishes specific standards for medical examinations and inquiries related to health (prospective employees, for instance, cannot be asked questions about previous medical conditions or treatments, cannot be required to take a pre-employment medical examination, and any health-related inquiries must be limited to their ability to perform specific job-related tasks)
- legislative history directs that ADA be construed in accordance with judicial interpretations of the Rehabilitation Act
- adopts many procedures and remedies of the Civil Rights Act of 1964
- is not affirmative action legislation

2. Ask students to read Student Handout #1, "Laws Protecting Individuals with Disabilities," and Student Handout #2, "You Be the Judge." Divide students into groups of four to work on the cases using the laws described in Student Handout #1. Have the groups discuss their answers in class.
3. Using Student Handout #3, "Schools and Religion," have students review some of the First Amendment cases applying to schools. Then ask them to read Student Handout #4, *Zobrest v. Catalina Foothills School District*, (a case argued before the U.S. Supreme Court in 1993) and review the information on the IDEA in Student Handout #1. Have them carefully go over the facts and the issues before the Court. Divide the class in small groups to review the eight arguments presented and decide which arguments support Zobrest (the petitioner) and which support the school district (the respondent). Discuss the findings with the entire class. Arguments #2, #3, #6, and #8 support Zobrest; arguments #1, #4, #5, and #7 support the school district.
4. Prepare students for a moot court hearing by comparing it with a mock trial. Some differences between them include: A moot court hearing, unlike a mock trial, is an appellate proceeding (a losing party is appealing the rulings of a lower court); no witnesses are called at a moot court hearing; legal, not factual, issues are decided at a moot court hearing (argue the law, not the facts); a moot court hearing is decided by a panel of judges (a mock trial is decided by a judge or a jury); the names of the parties are different (petitioner and respondent in a moot court—plaintiff and defendant in a mock trial).
5. Have students conduct a moot court hearing on the *Zobrest* case, following the procedures in student handout #5, "Moot Court Procedure." Assign roles. If you have a large class you can have two proceedings so all students can play major roles. Several students can be assigned to each side to work on the case. Dur-

Student Handout #2

YOU BE THE JUDGE

Directions: Imagine that you are a judge. Read each of the disability-related scenarios below and make a decision regarding the issues involved, based upon the information provided below and in Handout #1, "Laws Protecting Individuals with Disabilities." Be sure to give reasons for your decision (which law, if any, applies, and why).

Case #1: The League Calls Him Out!
During Little League baseball games, base coaches are typically on the field in coaches' boxes, located by first and third base. Little League officials, however, announce the following policy: "Any coach in a wheelchair may coach from the dugout, but may not be in the coaches' box." In issuing this rule, officials are concerned with the players' safety (specifically, colliding with wheelchairs during play). Larry Anderson, who uses a wheelchair, has never been involved in a collision during the three years he has been a Little League base coach. He challenges the policy in court. How should the court rule? Why? Is there anything else you would want to know before ruling?

Case #2: Whose Teeth Are They, Anyway?
John Harrison needs dental braces. He goes to the Knight Dental Center, which accepts him as a patient, and begins the two-year process required for braces. After a year, he finds out that he is HIV positive (HIV is generally regarded as causing AIDS). He informs the center that he is HIV positive, but that he does not have AIDS symptoms. Concerned for the well-being of their employees, the dental center tells him that he can no longer be a patient. Harrison finds another dentist who will accept him as a patient, but his costs are $600 more than Knight's original estimate. Courts have ruled that contagious diseases are physical impairments. Harrison files a lawsuit seeking damages for the extra cost of the dental work and for the emotional distress caused him. What should the judge decide? Is there anything else you would want to know before ruling?

Case #3: Where the Streets Have No Curb Ramps
The city of Philadelphia plans to resurface a number of streets. Residents who are disabled file a class action suit to make the city install curb ramps or slopes on street corners, so as to allow wheelchair access to sidewalks. Under the ADA, "reasonable accommodations" must be made in public accommodations to avoid discrimination against individuals with disabilities. If "alterations" have been made in public accommodations since the ADA went into effect, then these accommodations must comply with the statute. The city argues, however, that resurfacing is only a minor change, like painting a wall or sanding a floor, and does not obligate it to provide curb ramps. How should the court rule? Is there anything else you would want to know before ruling?

Case #4: Fair or Unfair?
Charlie Williams, 59 years old, is executive director of a security guard company. He supervises a staff of 20 people and 300 guards. One day, Williams' doctor tells him that he has brain cancer and has less than a year to live. He tells his employer about his condition. Four months later, the owner of the company asks Williams to retire, indicating that the company was losing money and has to eliminate his position. Williams files suit, claiming that he is being discriminat-

ed against and is still able to do his job. What should the court decide? Is there anything else you would want to know before ruling?

Case #5: Discrimination in Reverse?

Blake Horton has worked as assistant sports director for a paralyzed veterans organization for four years. One day, the organization decides to replace Horton, who is not disabled, with a veteran who uses a wheelchair. As the organization primarily runs wheelchair-sports programs, they feel that Horton's position should be filled by someone who represents their members and can serve as a role model. Horton claims he is being discriminated against because of his physical condition (lack of a disability) and personal appearance (does not use a wheelchair) and seeks to be reinstated in his job, with damages. The organization admits that Horton's job performance is not the reason for his dismissal. How should the court rule? Is there anything else you would want to know before ruling?

Case #6: Fit or Fat?

Susan Jones applies for a $5 per hour job as a lunchroom aide at a school. Her job duties include washing dishes and serving lunch to students. During her interview, a school official insists that she must be weighed on a scale. He then tells her that, as she is 30 pounds overweight for her height, she cannot be hired, since she exceeds the weight-height guidelines under the school's established policy. Susan claims that she is being discriminated against and insists that she is able to do the job. The school argues that its policy is needed to save money, as overweight people are less healthy and drive up insurance costs. What should the court decide? Is there anything else you would want to know before ruling?

Notes for Teachers to Accompany Student Handout #2, "You Be the Judge"

A number of the hypothetical scenarios on pages 50-51 are based on actual court cases. You may wish to assign students the task of researching these cases. What are the facts, issues, and decisions in these cases? In what courts were they decided?

Case #1: *Anderson v. Little League Baseball*, 794 F.Supp. 342 (1992)

Case #3: *Kinney v. Yerusalim*, 812 F.Supp. 547 (1993)

Case #5: *Blake Ortner v. Paralyzed Veterans of America*, 1992 Westlaw 438011, section 3 (D.C. Super.)

Case #7: *Honig v. Doe*, 484 U.S. 305 (1988)

Case #7: Should He Stay or Should He Go?

Jack Smith is a student with an emotional, behavioral disability and, reportedly, sometimes has uncontrollable physical or verbal outbursts. While at a development center for students with disabilities (where he has been placed by the school district), he assaults another student and breaks a window. The principal gives him a 5-day suspension for these acts. After several more incidents of misbehavior, including making sexual remarks to female students, he is suspended indefinitely while the school begins the process of expelling him. Attorneys for Smith argue that he should be allowed to remain in school while his review hearing (to expel him) is pending. How should the court rule? Why? Is there anything else you would want to know before ruling?

Case #8: A Question of Choice

John K. has been placed in a special school for students with moderate mental disabilities. In this school, students have no opportunities for interaction, even nonacademic or extracurricular, with non-disabled children. John sees that many of his non-disabled neighborhood friends are involved in many extracurricular school activities and wants to join them. His parents request a transfer to another school, but school officials refuse. They bring suit, asking that John be placed in a school alongside students who are not disabled? How should the court rule? Why? Is there anything else you would want to know before ruling?

Case #9: Banned from the Band

Pam, a 16-year-old high school student who uses a wheelchair, plays the clarinet in the school band. Since there is no ramp for her wheelchair, she has to be carried upstairs to the band room. One day, the school tells Pam that she can no longer be in the band because they do not want her to be carried up the stairs. Instead, the school says that they will bus her 17 miles to the nearest high school with a wheelchair-accessible band room. Pam takes her case to court, claiming that the school is legally obligated to make the band room in the school she currently attends accessible to her. The school claims it does not have the money to pay for a wheelchair lift or ramp. How should the court rule? Why? Is there anything else you would want to know before ruling?

Student Handout #3

Schools and Religion: The Supreme Court and the Establishment Clause

1. *Board of Education v. Allen,* 392 U.S. 236 (1968). The Court ruled 6-3 that a New York statute requiring school districts to purchase or loan state-approved textbooks for students in parochial, as well as public and private schools, was constitutional. The Court assumed such textbooks would not be unsuitable for public schools because of religious content.
2. *Lemon v. Kurtzman,* 403 U.S. 602 (1971). In this case, the Court introduced the three-part "Lemon" test. Applying this test, governmental action must: a) have a secular purpose; b) have a primary effect that neither advances nor inhibits religion; and c) not result in excessive governmental entanglement with religion. Since 1971, the Supreme Court has used the "Lemon" test in cases in which violations of the Establishment Clause have been alleged.
3. *Wollman v. Walter,* 433 U.S. 229 (1977). The government may send employees to religious schools to test students for learning or health problems.
4. *Wallace v. Jaffree,* 472 U.S. 38 (1985). The Court overturned a law that allows a period of silence for "meditation or voluntary prayer" at the beginning of each public school day. The Court found that the only purpose of such a period would be to promote religion.
5. *Aguilar v. Felton,* 473 U.S. 402 (1985). In a 5-4 decision, the Court ruled that New York's use of federal funds to send public school teachers into religious schools to provide remedial instruction to deprived children violated the First Amendment's Establishment Clause (excessive governmental entanglement with religion).
6. *Witters v. Washington Dept. of Services,* 474 U.S. 481 (1986). The Court upheld, without dissent, a state program that gave financial aid to a blind student at a Christian college. The program passed the Lemon test because the aid was given without any reference to use in a religious school.
7. *Lee v. Weisman,* 112 S.Ct. 2649 (1992). In a 5-4 decision, the Court applied its longstanding ban on school prayer to bar nonsectarian prayers at high school graduation ceremonies. The Court refused to reconsider its use of the "Lemon" test, but also largely disregarded the test in making its decision.

ing the oral arguments, you can require that more than two attorneys must speak. You also may want to videotape the proceeding to be critiqued later. Students should be given 12 class periods to prepare. You may want to schedule time in the library for research; they should also make use of Student Handout #4 and the Street Law text for constitutional arguments in support of their position.

Student Handout #4

Zobrest v. Catalina Foothills School District

Docket No. 92-94, Argument Date: February 24, 1993

BACKGROUND

The First Amendment prohibits the government from supporting religion ("shall make no law respecting an establishment of religion"). Since 1971, the "Lemon" test has been used for most Supreme Court cases in which violations of the Establishment Clause are alleged [first articulated in *Lemon v. Kurtzman,* 403 U.S. 602 (1971)]. Applying the three-prong "Lemon" test, governmental actions must: a) have a secular purpose; b) have a primary effect that neither advances nor inhibits religion; and c) not result in excessive governmental entanglement with religion. If they do not meet all three of these prongs, the Establishment Clause is violated.

FACTS

Jim Zobrest, who is profoundly deaf, attended public school in the seventh and eighth grades. The Catalina Foothills School District provided him with a sign language interpreter. However, Jim then enrolled in a private, Catholic high school. His parents requested that, under the Education of the Handicapped Act [now known as the Individuals with Disabilities Education Act (IDEA)], the school district continue to provide an interpreter for Jim. The school district refused on the grounds that the requested service would violate the Establishment Clause. School district officials stated, however, that if Jim attended a public or secular private school, they would pay for an interpreter. The Zobrest family then hired their own interpreter for Jim and filed a lawsuit challenging the school district's decision. The case remained alive in the courts for four years. By this time, Jim had graduated and the Zobrest family was asking to be reimbursed for their costs—$28,000.

ISSUES

Does the Individuals With Disabilities Education Act require school districts to provide a deaf student in a private, parochial school with a sign-language interpreter? Does the First Amendment's Establishment Clause permit school districts to provide a deaf student in a private, parochial school with a sign-language interpreter?

ARGUMENTS

Directions: Read all of the arguments below. Decide which arguments support

Zobrest (the petitioner) and which supports Catalina Foothills School District (the respondent).

1. Providing an interpreter furthers Jim's religious development and thus fails the "primary-effect" prong of the Lemon test.
2. The role of an interpreter is neutral or mechanical, similar to a hearing aid.
3. Providing an interpreter to Jim in a religious school results from his parent's decision, not the state's.
4. A live, human interpreter is an active participant in the student's education, similar to a teacher or tutor.
5. A reasonable non-believer would think that providing an interpreter in this case represented an endorsement of either a particular religion, or religion in general.
6. The sign-language interpreter's code of ethics requires them to provide neutral and accurate translation.
7. Paying for an interpreter would involve the state in directly assisting the religious functions of the school.
8. Simply providing an interpreter to Jim does not create a "symbolic union" between government and religion.

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Student Handout #5

Moot Court Procedure

The Players:

- Attorneys for the Petitioner (the party making the appeal)
- Attorneys for the Respondent (the opposing side)
- Judges—a panel of judges

Roles:

To prepare for the moot court procedure, attorneys for the petitioner and respondent need to:

- develop a statement of the facts
- highlight at least two facts to support their position
- cite and apply to this case at least two previous relevant court decisions
- cite and distinguish from this case two previous court decisions which might be used by the opposing side
- explain why the Court should rule in your favor

Judges will:

- develop questions to clarify the facts
- develop questions to clarify the relationship between previous court decisions and this case
- develop questions to clarify the constitutional implications of a ruling in favor of each side

The Hearing:

Petitioner's Argument. Allow 10 minutes. At least two attorneys must be used. Time includes questions from judges.

Respondent's Argument. Allow 10 minutes. At least two attorneys must be used. Time includes questions from judges.

Petitioner's Rebuttal. Allow 5 minutes. At least two attorneys, other than those who have already presented, must be used. Time includes questions.

Respondent's Rebuttal. Allow 5 minutes. At least two attorneys, other than those who have already presented, must be used. Time includes questions.

The Ruling:

In "open court" (i.e., in front of the whole group), judges are to discuss:

- The strongest arguments presented by Petitioners. Points that could/should have been raised but were not.
- The strongest arguments presented by Respondents. Points that could/should have been raised but were not.
- The decision of the court and the basis for it, taking into account the following:
    - the facts as presented
    - the applicable law
    - previous court decisions (precedent)

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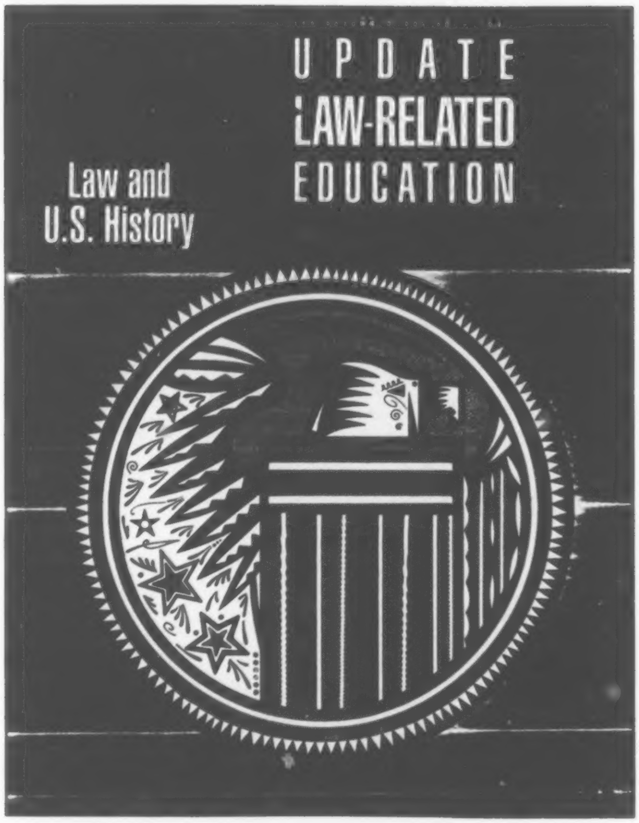

UPDATE
LAW-RELATED
EDUCATION

Law and
U.S. History

Special Committee
on Youth Education
for Citizenship
ABA American Bar Association

FALL 1993 VOL 17 NO 3

UPDATE LAW-RELATED EDUCATION

American Bar Association Special Committee on Youth Education for Citizenship

The Right to Sustainability:

The Environment, the Citizen and the Law

Introduction

This edition of *Update* is something of a departure. It is a call to action in law-related education, a call for attention to a growing worldwide concern which LRE should be seriously examining: the issue of sustainability. Our goal in the pages that follow is to help form the debate in the LRE community by focusing on some of the legal issues that are critical to the debate.

What exactly do we mean by "sustainability"? One definition is advanced in the June 25, 1993 edition of *Science*, which is devoted to the topic of Environment and the Economy. It defined *sustainability* as ". . . meeting the needs of the present without compromising the ability of future generations to meet their own needs."

Underscoring the importance of sustainability is a World Scientists' Warning to Humanity sponsored by the Union of Concerned Scientists. Signed by over 1,600 scientists (including 101 Nobel Laureates), it states: "We the undersigned, senior members of the world's scientific community, hereby warn all humanity of what lies ahead. A great change in our stewardship of the earth and the life on it is required, if vast human misery is to be avoided and our global home on this planet is not to be irretrievably mutilated."

By signing this document, these scientists, who are normally reluctant to take sides in policy debates, put their reputations on the line and put all of us on notice that we need to change the way we think about our relationship with this fragile planet that we call home. To start this process requires that we examine conflicting values, assess the consequences of economic dislocation, encourage political debate, and, most importantly, *establish new legal foundations*.

It is here that LRE can play a crucial role. By providing a legal context for understanding these issues, LRE can help promote dialogue on the legal questions which underlie environmental and economic sustainability. For LRE educators there is a richness of potential topics which are flowing into the public consciousness—and particularly the consciousness of young people—through the media. While this issue of *Update* can only begin to touch on some of them, my hope is that the articles and lessons that follow will provoke ideas, raise questions, and arouse passions, but above all, stimulate interest in the issues of sustainability.

Mary Louise Williams
Guest Editor

Opening Statement

Rarely in the 17-year history of this magazine has an issue so completely reflected the dedication and commitment of one individual as the one which you now hold in your hands. This issue is very much the personal work of Mary Louise Williams, an educator of extraordinary imagination and energy. Drawing upon her more than two decades of involvement with environmental issues, she has assembled a collection of materials that we hope will be of value to LRE educators in addressing the issues that are central to sustainability.

For me personally, working with her was both a joy and an education, as few in the LRE field can bring to bear on a subject Mary Louise's wide range of personal resources and substantive expertise. Not many, for example, could see the subtle interrelationships in the work of individuals such as Margaret Owings, an artist-poet of immense vision who speaks so eloquently of responsibility and guardianship; Stanley Euston, who, with his wife Ann, founded the Sustainability Project to create national dialogue on what they call "perhaps the central societal, political and ethical question of the late twentieth century: What is a sustainable society and how do we achieve it?"; and Patricia and Gerald Mische, founders of Global Education Associates, a network for people in 80 countries to advance ecological sustainability. In addition, Mary Louise reminds us of the vital but often overlooked role of citizen action groups in the article on nongovernmental organizations written by her husband Michael and Nancy and John Barlit.

The classroom activities also serve to underscore the relationship between LRE and these larger issues of global significance. Gayle Mertz and David Vanderhoof are but two of the increasing number of educators within the LRE community who recognize the importance of addressing these environmental issues, and Veronica Focseneanu shows how LRE can participate in this worldwide debate not only within the legal and environmental education communities of this country, but within those of the new emerging democracies as well.

Jack Wolowiec
Editor

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The Right to Sustainability

Once Upon a Future Time: Thoughts on the Global Environment and LRE

Mary Louise Williams

Not long ago, a question arose in a discussion among educators from Poland and the United States concerning a difficult choice. Ala Derkowska, founder and headmistress of a school in Nowy Sacz, Poland, had little money for facility upkeep, so she announced a competition. A first and second prize would be given to the classes making the most positive improvements in the physical appearance of the school.

Ala had founded her school on the premise that educating students for participating in a democracy must begin with opportunities for responsible choice and responsibility for that choice. Classes could democratically choose what they wanted to do. A committee of judges from within the community would select the winners.

The awards went to two classes that had carefully painted their classrooms. The first place winner had painted theirs a rather jarring, but student-pleasing blue. The winning students were elated. They had worked hard and had attended to little details such as painting the *inside* of the doors to their classrooms.

Another class protested to Ala. "We think the awards were wrongly given," they complained. "We gave all of our effort and attention to the grounds, the hallways, the restrooms and couldn't give as much attention to our own classroom as did the winners. We chose, instead, to concern ourselves with areas we use in common, areas that affect us all rather than only that which affects our class. We believe we should be chosen."

"What would you have done?" Ala asked the group of educators. The group struggled with the dilemma. Does one safely fulfill the obvious expectations, do the best job one can which may result in assured success? Or, does one focus effort on problems that are somewhat removed, less comfortable and familiar, and are certainly less personal because they affect us "commonly?" Choices imply that there are options which are more or less evenly desirable or undesirable. One weighs the options and makes a choice.

The law-related education movement is at a critical juncture as it approaches the 21st century. It must continue to assist in educating young people in developing an understanding of, an appreciation for, and a desire to participate in a democratic society. It will undoubtedly further expand its efforts in the new struggling democracies of Eastern and Central Europe.

It has another role as well—to educate students, teachers, legal educators for entering the debate on the legal implications of *sustainability of the "commons,"* an area of concern which is entering individual consciousness and broadening public debate. Stated very simply, *sustainability* is the ability to sustain life. Economic needs are met through means which resist further degradation of the environment and unnecessary depletion of resources. The *commons* is that which is needed by the whole for its mutual benefit or survival. When, in some way, the commons is exploited by individual entities, it is at the expense or peril of the whole.

A sustainable society has the ability to meet its needs without jeopardizing the ability of future generations to meet theirs. A sustainable society is committed to protecting the commons—the air, land, and water, with all of their concomitant relationships—for present as well as future generations.

These ideas are not new; they have grandparents and great grandparents. The public is rediscovering the ideas, however, in newer forms and broader forums because of implications derived from growing, corroborating scientific data. This data is polarizing positions and shrilling the debate based on individual economic, political, religious interpretations. What students and educators need is the means for entering the debate, and this is where LRE can play a role.

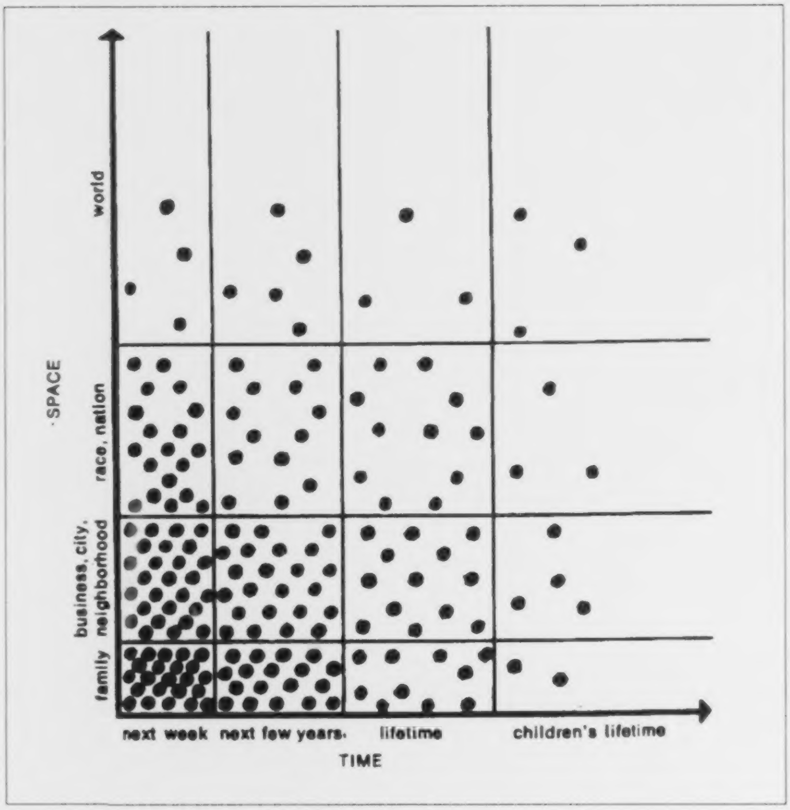
Law-related education can provide a legal framework for understanding environmental issues. It can break new ground by addressing the legal questions underlying environmental and economic sustainability. Socioeconomic, political and scientific information on sustainability is flowing into the public consciousness through the media. For law-related educators there is a richness of potential topics, several of which are explored in this issue of *Update*.

Through this author's personally focused lens (which is by no means exhaustive or authoritative) concepts from the "giants" in environmental studies are shared for poignant remembrance or new acquaintance. Many have been institutionalized through legislation and case law. But most importantly for LRE is that just as the giants in an old-growth forest, these concepts have stood tall and have taken deep root through time, providing nurseries for the emergence of new ideas, ideas such as *sustainability*.

The "Commons" and the Law

The proper treatment of the "commons" has posed a dilemma for societies throughout recorded history. The classic example was documented by Garrett Hardin in his article, "The Tragedy of the Commons," published in 1968 in *Science* magazine. He used the historical example of communal grazing lands, a concept shared in many cultures. With little understanding of "carrying capacity," productive grazing lands seemed limitless in their potential. It was, therefore, much more obvious that individuals could gain by adding more livestock and less obvious that all individuals would lose through the effects of collective overgrazing. This logic caused a spiral effect which resulted in the ultimate destruction of grazing lands and produced ruin for many.

The solution was individual ownership. This meant that the individual who profited from increased grazing on the land was the same individual who suffered losses caused by overgrazing. The concept of the "commons" extended little beyond the common concerns of the community in which we lived. We might think of it in the graphic terms provided by Dennis Meadows and Donella Meadows in the controversial book sponsored by the Club of Rome, "Limits to Growth," published in 1972.



In this space-time graph above, we see that the majority of people were—and are—concerned for short spans of time with matters affecting their families and friends, while concepts "farther out" in space and time, such as nations and scores of years, are of increasingly less concern.

We could use this same space-time graph to explain the continued expansion of the concept of what constitutes the commons and the environmental impacts on those commons.

Understanding the Commons as the Immediate Experience

With the passage of time, we extended the concept from pasture land to the air near our communities, the water in our streams, the resources of the forests, and the fish in nearby ocean waters. When a factory dumped its waste into a river or bay, its owner knew that damaging toxins would be carried downstream and away from the town in which it was located. In similar fashion, a tall stack on a factory dispersed noxious fumes and gases away from town. As residents of nearby communities complained, the factory responded by simply making the stack taller.

As populations grew so did pressures on the commons. At sea, fishermen faced with declining catches began to use drag nets to maintain their income. Whalers moved farther and farther into the oceans, turning their ships into floating rendering plants. As old-growth forests diminished, logging companies moved into areas previously considered to be only marginally productive. Environmental concerns extended only as far as the effects could be immediately experienced.

Individuals farther away, however, were experiencing the delayed effects of these actions. Their use of or access to the commons was being degraded, diminished, and, in some cases, was even becoming dangerous. Toxic wastes released into water began to have accumulative effects, causing disasters such as the mercury poisoning in Minimata Bay, Japan (see page 7), or fish kills in the Chesapeake Bay.

Tall stacks soaring hundreds of feet into the air allowed gases such as sulfur dioxide to be dispersed into the atmosphere where winds carried their chemical mischief to distant neighbors. Sulfur dioxide, for example, combines with moisture and oxygen in the atmosphere to form acid rain, which then falls on areas unfortunate enough to lie downwind. Toxic wastes were hidden out of sight in remote dumps, to be forgotten until a Love Canal in New York brought the problem out into the open.

Fishermen from halfway around the globe, using drag nets and state-of-the-art detection equipment, inflicted economic damage on nearby industries, such as codfishing in Newfoundland. As whalers moved farther and farther into the oceans, their increasing efficiency pushed species such as the blue whale to the brink of extinction. On land, logging and mining companies used economically efficient but ecologically damaging techniques that affected watersheds and water-dependent users in other regions.

Expanding the Spatial Dimensions of the Commons

We now know that what occurs in one small area can have not only regional but global consequences as well. Referring again to the Space-Time Chart, we have expanded the spatial dimensions. Initially, we were concerned in our communities about the air we breathed and the water we drank. Now, we find ourselves thinking more broadly, in terms of regional haze and global atmosphere, continental watersheds and global ocean currents. As a result, we have had to determine through the law what a right to the commons means—"ownership" of it as well as responsibility for its misuse. The federal Environmental Protection Agency was established to regulate and restrict access to the commons, thus acknowledging its spatial dimensions.

If we concede that industry has a legal right to pollute up to a certain level, what is that certain level? And how do we define pollution? To work toward some answers to these questions, we have had to begin to think in terms of health effects and property damage. The Clean Air Act, Clean Water Act, and the Toxic Substances Control Act are examples of laws that give definitions and set standards. Legal definitions differentiate between contaminants and pollutants, while standards are based on these definitions. For example, while contaminants discharged into water change the chemical, biological, or physical properties of water, they may not necessarily cause long-term harm. A critical point is reached, however, when concentrations cause the water to become polluted, meaning that contamination is present in amounts or of a type that may cause ill effects or even death in humans, animals, or plants.

At the same time, legislative and legal entities debate and grapple with definitions as these various acts come up for periodic re-authorization. Part of the ongoing debate has to do with effects of pollution or indirect costs called *externalities*, so named by economists because they are external to the price of a particular product. Recent thinking has moved us in the direction of "internalizing the externalities" by factoring into the price of a product hidden costs as well. One example is the 1990 Amendments to the Clean Air Act, which provide for the "buying" and "selling" of emission credits.

This development now gives industry a choice—it can cut emissions by buying better technology or it can purchase emission credits from a cleaner industry. In either case, a product's price now reflects the total cost of production. The effect is that the legal right to pollute is now *restricted and regulated*, which encourages stewardship of the commons through stabilizing and reducing emissions and pollution generally.

Protecting the Commons Through Stewardship

One of the most significant developments of the last century was the movement to establish public ownership of areas of unique natural beauty or of historical and cultural importance, thereby securing these areas for the enjoyment of present and future generations. Rather than allowing a repeat of the tragedy of the commons, we have legislated *protection and restricted use*. This new concept of stewardship of the commons can be traced to March 1, 1872, when President Ulysses S. Grant signed an act designating over two million acres of northwestern Wyoming as Yellowstone National Park. The State of New York followed suit in 1885 when it set aside a 715,000-acre "Forest Preserve" in the Adirondacks. Still later, in 1916, the National Park Act established the vast system of National Parks that we enjoy today.

When New York established the Adirondack Forest Preserve, it attached an important stipulation, that it "shall be kept forever as wild forest lands." As Professor Roderick Nash observed in his book, "Wilderness and the American Mind," no one at that time quite understood the importance of what had been done.

Expanding the Boundaries of the Commons

Thorough these legislative actions, the notion of preserving the wilderness as a part of the commons had been planted in the public consciousness. Through the efforts of John Muir, Yosemite National Park was established in 1890 as an area designed specifically to preserve the wilderness. Led by forester-ecologist Aldo Leopold, the concept of the commons expanded, recognizing a responsibility for preserving wilderness areas for the benefit of future generations.

The Wilderness Act of 1964 established the concept in law; the first legislated wilderness area, bearing Leopold's name, preserved it in fact. The Aldo Leopold Wilderness Area, located in the Gila Mountains of southwestern New Mexico, was established in 1971 along with dozens of other such wilderness areas, preserving millions of acres.

The Wild Rivers Act, which followed, was true to the principle that had inspired Leopold: "I am glad I shall never be young without wild country to be young in. Of what avail are forty freedoms without a blank spot on the map?" This idea prompted a Swedish exchange student testifying at the Alaska Wilderness hearings held in 1979 to comment "Your Alaska wilderness will not only be a national treasure, it will be a treasure for the entire world."

Leopold spoke eloquently for a land ethic in his "A Sand County Almanac," long regarded as an environmental classic. It extended the commons to the other living entities with which we share the earth.

> The land ethic simply enlarges the boundaries of the community to include soils, water, plants, and animals, or collectively: the land. . . Perhaps the most serious obstacle impeding the evolution of a land ethic is the fact that our educational and economic system is headed away from, rather than toward, an intense consciousness of land.

A recent outgrowth of this concept of a land ethic has been the effort to protect the diversity of plant and animal species. This requires preservation of habitat associated with the species as well.

The Endangered Species Act has focussed attention on species on the verge of extinction as well as their habitat. However, each time the act has come up before Congress for reauthorization, arguments are voiced calling for a scaling back of the protection it affords. The Marine Mammal Protection Act was enacted in 1972 and was implemented twenty years ago. Even with protection, the risks for marine mammals such as sea otters and seals have not been abated, but grow even more serious over time. Only through the devotion of individuals such as Margaret Owings, founder of Friends of the Sea Otter, have such creatures of the wild continued to exist.

Through the efforts of countless such visionaries who recognize that biodiversity "will provide answers to questions we haven't even learned to ask yet" such ideas are spreading throughout the world. Biodiversity become a major global issue at the 1992 Rio de Janeiro U.N. Conference on the Environment and Development, adding another dimension to the concept of the commons.

Defining Legal Rights for "Natural Objects"

This new understanding of the commons has necessitated a broader, and to some, revolutionary, rethinking of the concept of "standing" if the commons is to be protected in a court of law. Professor Christopher Stone addressed the question, "Should Trees Have Standing?—Toward Legal Rights for Natural Objects," in his Southern California Law Review article, (Vol. 45:450 1972), and in his book of the same name.

> There is something of a seamless web involved: there will be resistance to giving the thing "rights" until it can be seen and valued for itself; yet, it is hard to see it and value it for itself until we can bring ourselves to give it "rights"—which is almost inevitably going to sound inconceivable to a large group of people....I am quite seriously proposing that we give legal rights to forests, oceans, rivers and other so-called "natural objects" in the environment—indeed to the natural environment as a whole.

In the ensuing years, the legal community has begun to move toward what Stone called the "unthinkable"—granting rights to environmental entities. Given that there is such a thing as a right to instream flow of rivers—considered vital to sustainability of plant and animal species—would not the next logical step be recognition of the right to a quality environment for our posterity?

Moving the Concept of the Commons Toward Sustainability

Referring again to our Space-Time chart, a recent and important extension of the concept of the commons relates to the time factor. There is growing recognition that one of the future consequences of present actions could well be the exhaustion of resources. As we have expanded the concept of the vulnerable commons to a global scale, lengthened our time horizons, and broadened its scope to include all living entities, we have developed a new focus—*sustainability*. Sustainability compels us to examine our actions to determine which are consistent with sustaining a quality of life while at the same time protecting our global environment. This may require that nations accept the granting of rights to these broad definitions of the commons and work in concert to achieve sustainability on a global scale.

International Law and the Environment

Sustainability became a topic of mainstream global debate when the U. N. Commission on Environment and Development, chaired by Norwegian Prime Minister Gro Harlem Bruntland, issued "Our Common Future" in 1987. The commission's report focused on the tension between necessary economic development and global environmental destruction by considering two fundamental questions:

1) Is it possible to provide a basic standard of living for a world population which is growing exponentially without depleting non-renewable resources and further degrading the environment? and

2) Is it possible to provide for the poorest members of the world community with a basic quality of life while recognizing that we are facing a potential environmental collapse?

To begin global dialogue on these questions, the United Nations General Assembly convened a Conference on Environment and Development in Rio de Janeiro in June of 1992. Popularly known as the "Earth Summit," the conference commemorated the first United Nations Conference on the Environment, held 20 years earlier in Stockholm, Sweden.

With perspectives and input provided by national government representatives and individual citizen groups, called NGOs or nongovernmental organizations, a number of guiding principles emerged to confront the problems of the Earth. Known as Agenda 21, they embodied the central agreement of the Earth Summit and were given force by General Assembly resolution 44/228, which calls for the development of strategies and measures to halt and reverse the effect of environmental degradation.

Acceptance of some of the basic premises of Agenda 21 is far from universal, however. Some believe the economic systems under which much of the world is operating must be reexamined and redirected. There is also increasing recognition that accepted barometers of economic success and well-being, such as Gross National Product, do not take into consideration depletion of non-renewable resources; this makes it impossible for a nation to assess its well-being if it has jeopardized its future for present economic success. The fact that the global community has identified this problem says much about its commitment to seek out new models and new definitions.

There are reasons to be optimistic about the global community's ability to come to grips with threats to the commons.

There are other reasons to be optimistic about the global community's ability to come to grips with threats to the commons. Borrowing from our original definition, once certain actions by individual nations are agreed upon as detrimental to the whole, they become matters of common concern, and one way that nations define these matters is through treaties.

Expanding the Concept of the Commons Through Treaties

Article VI of the Constitution provides for the ratification of treaties, and clearly gives them the force of law:

> . . all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, . . .The Senators and Representatives. . .shall be bound. . .to support this Constitution. . .

Throughout our nation's history, we have been signatories to a number of international agreements which have produced profound change in the behavior of nations and their people. Perhaps the two most notable in recent years are the Nuclear Test Ban Treaty of 1963 and the Montreal Protocol on Protection of the Ozone of 1985.

Those of us old enough to recall the 1950s and early 60s remember those years as a time when nuclear weapons were commonly tested in the atmosphere or under water. In later years, measurements disclosed that the radioactive fallout caused by these blasts spread strontium-90, a bone-seeking radioactive element, to the farthest reaches of the globe. In the face of mounting pressure from the rest of the world, the U.S. and the U.S.S.R. began negotiations aimed at banning nuclear tests in the atmosphere. The result was the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water. In essence, what the treaty represented was a recognition that the air and the sea rightfully belonged to all nations as a part of the commons.

Scientific research also laid the groundwork for another major international treaty, the Montreal Protocol on Protection of the Ozone, ratified in 1985. Dr. Richard Bradley, a Department of Energy economist who worked with the U.S. negotiating team, commented in a private conversation that Montreal had been a major turning point. It showed how far nations had come in their ability to address sophisticated ideas and complex scientific data in the context of environmental degradation and economic development. Ratification of the protocol by the U.S. also underscored our commitment to and respect for the rule of law, providing an important model for the world's growing number of nascent democracies.

Conclusion

Science has and will continue to play a vital role in providing important data to aid in formulating the policies, laws and treaties necessary to protect our commons. Increasingly sophisticated tools, such as computer modeling of world climatic data, give new insights into the global effect of local actions. Unfortunately, the level of public participation in this vital area has failed to keep pace with the march of science. Because it cannot—or will not—try to understand complicated issues and make recommendations to governmental policymakers, the public often finds itself left out of the process. Clearly, what is needed is a citizenry capable of making informed, well-reasoned choices, a citizenry that can balance competing interests to make decisions that promote the common good. It is here, perhaps, in instilling these skills in our nation's young people, that law-related education can make its most significant and far-reaching contribution.

Teaching Strategy

Minamata and Love Canal: A Pollution Tale of Two Cities

Mary Louise Williams

How do we arouse public interest in environmental conflicts in constitutional democracies such as Japan and the U.S.? Who determines the forum (place for public discussion) as well as the form of resolution (mediation, litigation, etc.)? To answer these questions, two case studies of pollution are examined—mercury poisoning in Minamata, Japan, and toxic waste poisoning at Love Canal in New York State, United States. In each case mediation was used to try to resolve these environmental problems. From the mediation came litigation and ultimately laws. Each of the two lessons can be used independent of the other; each takes two days.

Editor's note: This strategy was prepared in connection with the author's work in 1987 as a Japan Foundation Fellow.

Objectives

1. To understand how citizens can use the law as an agent of change.
2. To compare two environmental case studies in Japan and the United States.
3. To analyze the use of the political/legal systems in changing environmental attitudes and behaviors.

Grade Level

Secondary

Materials

Handout 1, Lesson One (found on page 8)—Minamata Case Study and Map (everyone)

Handout 2, Lesson One (found on page 9)—Mediation Role Descriptions (Groups 1, 2 and 3)

Handout 3, Lesson One (found on pages 10-11)—What Actually Happened, Minamata (everyone)

Handout 4, Lesson Two (found on pages 12-13)—Love Canal Case Study and Maps (everyone)

Handout 5, Lesson Two (found on pages 14-16)—Public Hearing Role Descriptions (Groups 4, 5 and 6)

Handout 6, Lesson Two (found on page 17)—What Actually Happened, Love Canal (everyone)

Procedures

1. Background Information and Preparation

Ask the students to define *change*. Write their responses on the board. Then ask how societies bring about change? You may wish to expand on their examples by mentioning the broadened right to vote, child labor, slavery, women's rights, ethnic and racial equality, etc.

For the purposes of these lessons, the following definition of *social change* will be used. You may want to write the definition in a prominent place as a focus.

> *Social change* is a significant reorganization of or transformation in specific attitudes and behaviors of the people within a society. These changes in attitudes and behaviors may be brought about by:
> 1) actions of the people themselves, or
> 2) actions of the government in how it drafts laws, and directs, manages, or maintains certain aspects of the social order.

An example of *actions of people themselves* would be the Civil Rights Movement in the United States during the 1950s and 60s. Individuals such as Rosa Parks, Martin Luther King, and Malcolm X refused to abide by the segregation laws set down decades before. They marched, demonstrated, and refused to be intimidated. Their actions gained worldwide attention and forged a national consciousness, which resulted in one of the greatest social changes in U.S. history, the beginning of the equality of the races. This new social equality was reinforced through political and legal action.

There are numerous examples of *actions of the government*. The federal government—Supreme Court, Congress and the President—and the state governments have shaped laws to insure equality of the races. *Brown v. Topeka Board of Education*, the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Twenty-Fourth Amendment to the Constitution are all examples of the use of law to direct, manage, or maintain equality.

Mediation, arbitration, legislation, and adjudication (the courts) have been used to decide questions that a diversity of opinion can not resolve. Some feel, however, that the courts have too often been used to resolve difficult issues that could have been better dealt with in other forums. It was best said by Alexis de Tocqueville: "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."

The following comparative lessons demonstrate this.

2. Activity Preparation Phase

Divide the students into six groups.

- Groups One, Two and Three will

(continued on page 11)

Handout 1

Lesson One, Minamata Case Study: "The Disease of the Dancing Cats"

On the Japanese island of Kyushu, in Kumamoto prefecture (equivalent to a U.S. state), lies the fishing city of Minamata. Since 1908 Chisso Corporation, a chemical company, had provided employment for the local population. As early as 1926 the fishing industry had come into conflict with Chisso over pollution damage to their fisheries. Demands had been made by the fishermen for compensation for pollution damage; Chisso had paid. But in 1953 frightening new evidence was mounting that something was terribly wrong.

Birds began to fall from their perches. Some flew into buildings as though they had lost their sense of coordination. Cats walked with an awkward rolling gait, sometimes tripping over their own legs. Many seemed to go mad, running around in circles, foaming at the mouth, and finally falling into the sea. Local fishermen nervously watched this strange bird and animal behavior, calling it "the disease of the dancing cats."

The disease spread to a number of the Minamata fishermen and their families. Between 1953 and 1956, 40 families were affected. Healthy adults soon experienced a violent trembling of their hands. Not only could they no longer think clearly, they couldn't operate their boats. Numbness started in the lips and legs and then moved on to disturb vision, speech and all bodily functions. After becoming bedridden, the victims fell unconscious, with wild fits of thrashing and shouting. Families had to tie the victims down to avoid self-injury. Some 40 percent died.

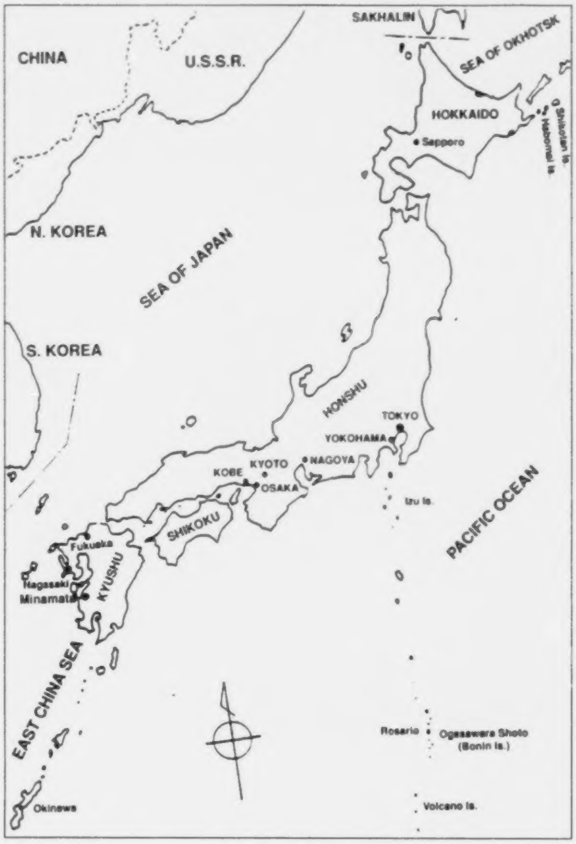
Shame and guilt kept the victims' families from openly complaining. Since the victims lived in a relatively poor area, the richer families assumed the "disease" was a result of inadequate health habits and therefore contagious. They shunned the victims and their families out of fear.

Finally, in 1956 the medical profession identified the "disease" as mercury poisoning and the Chisso Corporation as the probable but not conclusive source of the problem. As a result of these findings the victims formed the Mutual Assistance Society to negotiate with Chisso for relief.

Chisso refused to acknowledge responsibility despite verification by nearby university researchers of the medical profession's findings. These researchers had traced the source to Chisso Corporation. Their chemical refuse, containing mercury, was being dumped into Minamata Bay.

Authorities closed Minamata Bay to commercial fishing as of December, 1956. Demonstrations by organized fisherman caused Chisso to offer a sympathy payment of a total three million yen ($8,300). Chisso made sure that everyone understood the offer was not for compensation, which would have admitted fault. Angry fishermen stormed the plant and took the plant manager hostage overnight. Chisso raised the offer to a total of Y13 million ($36,000). The fishermen demanded greater compensation. Chisso agreed to mediation.

JAPAN



Handout 2

Mediation Simulation

You are about to play the roles of the various Japanese participants in the mediation, a method of informal dispute resolution. Mediators encourage each side to state its positions. Then they to try to find common ground for agreement which might lead to a resolution of the conflict. The mediators can offer ideas, but they try to get the disputants to find the areas of agreement. The resolution must be acceptable to both sides.

Group 1 will play the role of the managers of Chisso Corp.

Group 2 will play the fishermen/victims.

Group 3 will be the mediators—Minamata's mayor and local delegates to the Kumamoto prefectural assembly (like a state legislature).

1. Get in your groups and together review and discuss the information in your role description to help you understand the situation as a Japanese would. Remember, you are role-playing, which means you are someone else in another time and in another culture.
2. Prepare to present your case based on the information in the role description. Decide what is of the greatest importance or value to you. This you *cannot* "mediate." Decide what can be mediated as a basis for a resolution to the problem.
3. The mediation session will be explained by your teacher. Groups 4-6 should take notes on the process and the content.

The time is December, 1958. The place is a government building in Minamata, Japan.

Mediation Role Descriptions

Group One, Chisso Managers: You have served your nation by helping in its postwar recovery and economic growth. You have produced chemical fertilizers used to raise agricultural yield, as well as plastics used in industry. You have certainly been responsible for the economic well-being of Minamata by employing several hundred people. You pay 45% of the taxes collected by the city. Of the city's economy, 70% is directly or indirectly dependent on Chisso Corporation. Therefore, you can use the threat that if the fishermen and victim's demands are unreasonable, you may have to cease operations and close the plant.

You are willing to make sympathy payments to restore harmony, but not compensation, which would admit guilt. You feel sorry for the victims, but you will not accept responsibility for what has happened to them. It is true that you dump refuse into the bay and that mercury is used in your processing. You are not convinced that the scientific data is correct. The people are the cause of their illness; they should have better hygiene.

Group Two, Fishermen/Sufferers: You fishermen have lost your livelihood. You cannot sell your fish because of the mercury contamination; the health officials have banned sales. How will you feed your families? Fishing is all you have known! Your debts are rising because of the health costs of your stricken families. The health officials have told you that your sickness is caused by mercury poisoning. YOU MUST HAVE COMPENSATION for your loss of health and life and all the lost income since the closing of the bay to fishing. You face terrible rising debt, since many of the fishermen cannot work. You must get some kind of reasonable settlement soon.

You want an apology from Chisso, and an admission of wrongdoing, and you want Chisso to clean up the bay. Research has shown that organic mercury can cause birth defects if eaten by pregnant women and can cause genetic damage in humans. In the surrounding area, 22 children have been born defective. All of this has caused shame and loss of face. You fear you have damaged your reputation and you fear ostracism (social exclusion from the community) because of being different. Even by demanding compensation you realize that it is putting your selfish interests above the community, something good Japanese do not do.

Group Three, Mediators: You are the elected government of Minamata. One of you is mayor and the rest are delegates to the prefecture (state) assembly. You are former Chisso executives or members of the Chisso union. You will have to stand for re-election in the near future. Chisso has political as well as economic dominance in Minamata. You have to worry about Chisso's threats of closing the plant. That would mean the end of your city's prosperity and further unemployment. The unemployment caused by an idle fishing industry is bad enough without that of the plant. Such a serious downturn of the economy of your city would stop growth. All of this conflict is hurting the city; you want harmony restored.

There is no question about the suffering of the fishermen and the mercury poisoning victims. You know the 40 families should receive some just compensation. But the question is, should the suffering of 40 families be allowed to threaten the economic well-being of the entire community? Chisso has already made generous offers. Ultimately, you might urge both sides to accept reasonable payments for deaths which have already occurred, funeral expenses, and separate annual payments for adults and children. It is the Japanese custom to "clear the slate" at the end of each year. Urge both sides to settle this before the New Year.

Handout 3

What Actually Happened

The recommendations of the mediation committee translated into individual sympathy payments rather than compensation: payments of $830 per death and $55 for each funeral expense; annual payments of $280 per adult and $83 per minor. It was not satisfactory to all of the sufferers; however, persistent pressure from the mayor and city councilmen and from mounting debt forced a settlement. By December 30, 1958, it was all over; the Minamata victims and Chisso signed the agreement. Government mediation was consistent with the traditional Japanese methods of resolving dispute. Social harmony was restored, or so it seemed.

Earlier that year a national research team had confirmed that the Minamata disease was caused by the eating of seafood contaminated by mercury discharged into the bay by Chisso. This was confirmed by more research by Kumamoto University. The findings were reported to the Diet (parliament). The research team was immediately disbanded, and the research funds for Kumamoto University were cut off. Kumamoto University continued research through financial support from the United States National Institute of Health. Despite mounting scientific evidence, officials refused to investigate Chisso.

In 1964, in Niigata prefecture on the island of Honshu, a similar disease began to show up in the population eating fish from the Agano River. Upstream the Showa Denko factory was using a chemical process like that of Chisso. Once again the prefecture's university began the research. Niigata University Medical School confirmed that it was mercury poisoning from the factory.

The university research made the report public over the strong objection of government officials. The Niigata victims, with the help of sympathetic attorneys, filed suit against Showa Denko in June 1967. This was the first postwar suit filed against a polluting industry. In September 1967 a second pollution suit was filed dealing with air pollution. In July 1968 a third suit dealt with cadmium poisoning. In Minamata one group of victims filed suit. These four suits became known as the Big Four Pollution Cases.

The first three won major victories for actual and potential pollution victims. Then the Minamata victims won theirs. Industries were instructed to use the best technology in the world without regard to cost. The Minamata decision went even further.

1. The court required companies putting out effluent to shut down operations immediately if there was any question about safety.
2. "Precise medical cause" would not have to be scientifically proven by the victims. The burden was on the company to prove that it wasn't the cause of that pollution-related disease.
3. The compensation awards were up to nine times more than the earlier amount agreed upon.

The Minamata victory in the courts can actually be attributed to more than just the legal effort. In fact there were three factions of Minamata sufferers, each group of which tried different tactics. Group 1 continued to mediate for additional payments. Group 2 chose to use the courts, as we have just described. Group 3 was called the direct-negotiation group. For this faction an apology was more important than compensation. They knew by the very nature of litigation it could never get an apology from the Chisso executives to restore their human dignity and their humanity. So in order to support litigation as well as get the apology, they used confrontational tactics.

As a result, there were more negotiations with Chisso, which resulted in further concessions by the company:

- lifetime annuities to be adjusted twice a year,
- a $1 million fund to provide medical and economic help for the victims,
- an agreement to work with local officials to clean up Minamata Bay,
- an apology by the President of Chisso Corporation while kneeling before the victims, as well as a full and public apology.

Furthermore, the Diet passed new laws. The Law for the Resolution of Pollution Disputes (the Dispute Law), has provided a means of resolving citizen disputes against alleged polluters through local review boards, prefectual review boards and a Central Pollution Dispute Coordination Committee. It has established a faster, cheaper way to achieve relief for pollution victims.

The Law for the Compensation of Pollution-Related Health Injury (the Compensation Law) distinguishes between toxic diseases caused by poisoning from mercury and cadmium and nonspecific diseases such as asthma caused by air pollution. A sufferer after being certified by medical and legal experts then qualifies for substantial benefits. The cost of these benefits is totally paid for by the polluter.

The government has also enacted the National Environmental Policy Act (NEPA), modeled after the same law passed in the United States. It provides for extensive planning and preparation before facilities can be built. These environmental impact statements determine if there will be a harmful effect on the environment. Then public hearings are held, as in the U.S., to get citizen input into the proposed project.

The days from "the disease of the dancing cats" to those of environmental impact statements have marked a steady progression of changes in attitudes and behaviors of Japanese people. These changes have resulted in a variety of actions taken by the victims and the many people who have supported them. They have used mediation, direct-negotiation and confrontational violence, and the courts to force change. The Japanese government has recognized that unhampered economic growth can come at a terrible price, and sometimes with irreparable damage to the population and environment. It has had to rethink its priorities.

Sources Used in the Preparation of This Lesson

This study relies extensively on Frank Upham's *Law and Social Change in Postwar Japan*, Chapter Two, "Environmental Tragedy and Response," pp. 28-77. All statistics and facts presented come from this source unless otherwise noted within the text.

Montague, Katherine and Peter Montague. *Mercury*, Sierra Club, The Guinn Company, Inc., San Francisco, 1971.

Upham, Frank K. *Law and Social Change in Postwar Japan*, Harvard University Press, Cambridge, 1987.

(continued from page 7)

work on the Minamata Case Study.

- Groups Four, Five, and Six will work on the Love Canal Case Study.

Explain that by doing a comparative study of these similar pollution cases, students will see how citizens forced change in attitudes about the environment in each nation.

Minamata Case Study: Groups One and Two should have copies of each other's information in order to prepare appropriate responses. Group Three should have copies of each as well.

Group One will represent Chisso Corporation.

Group Two, Minamata pollution victims/fishermen.

Group Three, government officials of Kumamoto prefecture (state), acting as Mediators.

Love Canal Case Study: Groups Four and Five should have copies of each other's information in order to prepare appropriate responses. Group Six should have copies as well.

Group Four, government officials.

Group Five, members of the Love Canal Homeowner's Association.

Group Six, officials from the Environmental Protection Agency, acting as "hearing officers."

Hand out the appropriate case study material for each group:

- Use the maps to help each group understand the location of the case study. Go over the instructions with each group, as provided in the student materials.
- Give time for preparation of their positions.

3. Activity Presentation Phase

Mediation Simulation - Minamata. The time is December 1958. The place is a government building in Minamata, Japan. For the mediation session set the room up in a "u" shape, with mediators at the head and the two sides facing each other.

Instructions on How to Conduct the Mediation: Allow each side to state its position. Mediators facilitate the session by clarifying positions and stressing some of the information given in the roles. (Mediators should have access to all information.) Try to get the sides to come up with solutions that they can live with. This is not a win-lose situation but a win-win. No one side gets everything it wants.

While the Minamata groups are simulating the mediation, have the Love Canal groups watch and take notes on the content and on the process. When doing the Love Canal public hearing you will, of course, reverse the process.

Distribute "What Actually Happened," Handout 3. Read carefully and discuss, making sure the students understand the sequence of events.

Public Hearing Simulation - Love Canal. The time is February 1979. The place is a school auditorium in the Love Canal area of Niagara Falls, New York.

The students from groups 4-6 present their public hearing, using the information and directions provided.

Distribute "What Actually Happened," Handout 6, and go over with the students.

4. Debriefing

The following questions are suggested as a debriefing guide. Other questions have been offered throughout the lessons.

(a) What do the two cases have in common?

(b) What role did the government agencies, courts, corporations, and individuals play in each case?

(c) Have changes in environmental attitudes come about because of these two cases? If so, what agent was responsible? The people? The government? The courts? Why?

(d) Which of these agents of change do you think should have the ultimate responsibility for maintaining a healthy environment?

(e) You simulated one forum—mediation—in which some resolution took place. Do you think it was as effective as the forum of adjudication (the court system)? Why or why not? What about direct confrontation, as used by citizen groups?

(f) Should corporations have a moral or ethical responsibility for a healthy environment? Why or why not?

(g) What is the most important lesson you learned from these two case studies?

Handout 4

Lesson Two, Love Canal Case Study

After World War II many towns and cities welcomed chemical industries as a source of jobs and a stable tax base. Unfortunately, many of the sites were major tourist areas because of their environmental beauty. But often when tourism and industry had to compete, the more steady source of revenue and jobs won out. Such was the case of Niagara Falls.

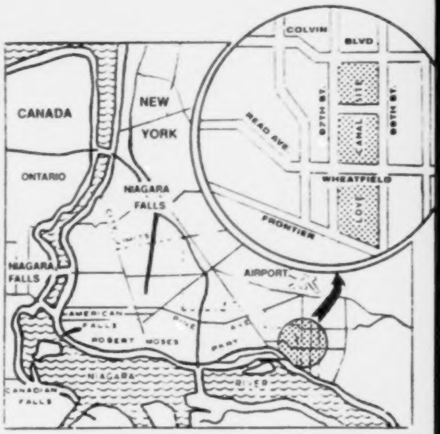
Between Canada and the state of New York is situated one of the world's most scenic environmental wonders—Niagara Falls. A city of that name was built on the Niagara River, catering to tourists from all over the world who had come to see what many have called "one of the most spectacular waterfalls on earth." But the city was also an industrial center, with facilities from the Olin Corporation, Union Carbide Corporation, DuPont, Plastics Corporation, and Hooker Chemical. The city's decision to encourage industry at the expense of the environment had cost the region much of its fishing, wildlife, scenic beauty, and tourist potential. The residents became adjusted to the acrid smells; the tourists wouldn't and the wildlife couldn't.

Less than a mile from the heavily industrialized section of Niagara Falls lay a 16-acre residential area called Love Canal. Love Canal had been a mile-long trench dug perpendicular to the Niagara River, measuring approximately 15 yards wide and 40 feet deep. It had been intended as a part of a transportation diversion around the great falls, as well as a source of cheap hydroelectric power. All of this was to accommodate a large industrial city to be built there by a William T. Love. When the financial resources were used up, the plans for a city and the trench were abandoned. This left the surrounding area as it was, orchards and meadowland. Because of the high water table and frequent rains, parts of the trench filled and became a favorite area for fishing and swimming in the summer and ice-skating in the winter.

Then the trench was acquired by Hooker Chemical Company, a manufacturer of pesticides, plastics, and caustic soda. In the 1940s Hooker drained the trench, lined it with clay, and dumped some 43.6 million pounds of 82 different chemical wastes into the trench in 55-gallon metal barrels. (Nader, p. 271) Then they filled parts of the trench with a clay casing, dirt, and what the residents remembered as an "oil and gray mud."

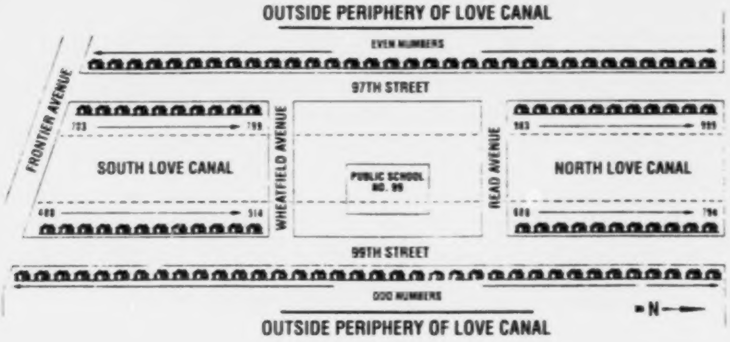
Residents living in houses surrounding the trench began to experience chemical/industrial odors which wouldn't go away, a "greenish luminescence" above the canal on humid nights, and spontaneous fires and explosions in hot weather. When people began to ask about it, the Niagara County Health Department and the city commented that it was a nuisance but not dangerous. Hooker wouldn't comment, claiming they had no records on the dumping nor the chemicals dumped. And they no longer had legal responsibility for the land; they had sold it.

Hooker had deeded the land in 1953 to the Niagara Falls Board of Education for a payment of $1.00. In the quitclaim (a release of claim to property) Hooker stated that it would not be liable for any deaths or injuries that might occur in the area. This clause was like a red flag to the school board's attorney, who warned the board of the risk that could be involved in accepting land which had been a chemical company's dump site with such a clause in the quitclaim.



The Board of Education began building an elementary school and playground. The World War II Baby Boomers needed a school in the area, and the board needed land with a price that was right. It was built at the canal's midsection, with the building site having been moved once when the backhoes had unearthed some of the "witches brew." Unlike other schools, this one was built without a basement or swimming pool. With a school so close by, young couples with small children began to move into the area, having been assured that they would soon have a park and playing fields in the open area of the canal just behind their houses.

There had been many "incidents": children burned from residues on the playground surface; a "strange black sludge" seeping into basement walls which couldn't be plugged; increasing complaints about headaches, weepy eyes and noses, respiratory and nerve disorders, rectal bleeding; incidents of miscarriages and an alarming number of children born with birth defects, deafness, clubfeet, even mental retardation. These incidents, however, did not seem to alarm the residents. What did alarm them was the prospect of rumor lowering property values. Since Hooker paid a lot of wages and salaries in the area, it is not clear how long it would have taken the people to finally



accept that something was very wrong. But in 1976 nature forced the people to come to that realization.

When the snows melted in the spring of 1976, the city had set a new record for having the heaviest snowfall in its history. With the run-off and accumulated melt came the worst odors the Love Canal-area residents could remember. Trying to locate the source, they began talking among themselves. The source was found in their basements. A black, oily ooze was coming through cracks and drainage holes. Several tried to pump it out into the city sewer. One resident wrote the local paper, the *Niagara Gazette*. This letter was the first time the outside world was allowed to know about the residents' problems. Newspaper reporters such as Michael Brown began to explore the issue.

A sample of the black ooze was taken to Chem-Trol Pollution Services for analysis. When the report was made public through the newspapers, October 3, 1976, residents and public officials finally became alarmed, some 30 years after the first signs of trouble. The analysis showed the presence of some 15 organic chemicals, among which were:

- *PCBs—polychlorinated biphenyls*—pesticide and industrial solvent—can impair reproduction; can cause cancer (carcinogen), headaches, nausea, diarrhea, liver problems, numbness, fatigue, and birth defects.
- *C-56—hexachlorocyclopentadiene*—used as insulating fluid in electrical transmission and in industrial production—can cause damage to every body organ. Highly toxic.
- *benzene*—solvent, industrial cleaner—may cause cancer and mutations. Causes headaches, fatigue, weight loss, nose-bleeds, bone marrow cancer. (Zipko, pp. 24-28)

The first alarm shown by the officials of the Niagara County Health Department was not for the residents around Love Canal but for the city sewer system into which the residents had been pumping the black ooze. They warned the residents that if they didn't stop they would be fined $25 for each violation. (Nader, pp. 179-180) At this point the New York State Department of Environmental Conservation urged the city to help the residents, but the department itself did nothing more than take a water survey next to the canal.

The spring rains of 1977 brought more surfacing of chemicals, more health problems and complaints, but no governmental action and certainly no help from Hooker Chemical. By May 1978 the New York State Department of Health determined that 95% of the homes around the canal were saturated with hazardous chemicals. The United States Environmental Protection Agency also looked at the analysis and determined that the contamination posed "a serious health threat."

Air samples taken from basements from homes immediately situated around the Canal indicated the presence of organic chemical compounds which were carcinogens. (Nader, p. 285) By August 1978 the New York Health Commissioner declared the Love Canal problem "an official emergency." This translated into urging pregnant women and small children to move from the area and asking the school board to delay the opening of school. But no official help was offered!

The residents formed the Homeowners' Association, believing that strength in numbers would force public officials to answer their questions and to take action. They urged the county and state to find public funds to help make it economically possible for them to leave their homes. The president of the association, Lois Gibbs, even wrote to President Carter. After flying to New York and conferring with Governor Hugh Carey, the President of the United States declared Love Canal a national emergency, thus releasing Federal Disaster Assistance Funds. This was historic in that this was the first time these federal funds were used for a human-made disaster.

Only 100 families living around the southern end of 97th and 99th Street along the canal, known as ring one, were evacuated and relocated temporarily on an Air Force base. But for how long would they be relocated? At whose cost? City? County? State? Federal? What would happen to their homes and the investment they had in them? Who would pay to have the homes condemned or cleaned up? And what about the other 200 or more other families that were also threatened? How far had the chemicals traveled? How many blocks away were other residents at risk of health and life? Why should they have to stay?

Handout 5

Public Hearing Simulation

You are about to play the roles of the various participants in a public hearing between the officials of the city and state and the Love Canal Homeowners' Association. The homeowners' feelings are so bitter toward the state officials that officials of the Environmental Protection Agency (EPA) are acting as mediators.

You will be simulating this session with some of you playing roles of EPA hearing officers/mediators. You will conduct the meeting as well as offer recommendations to resolve the dispute. Each side of the dispute is encouraged to state its positions. The hearing board offers ideas to try to find common ground for agreement, which might lead to a resolution of the conflict. If not, the board can ultimately decide the issue by sending recommendations to a legislative or legal body for final action. Recommendations can sometimes have the force of law if given such power through legislation. In this case, the EPA will offer written recommendations at the end of the session, which will be submitted to the state and federal governments.

Group 4 will play government officials from the city and state.

Group 5 will play members of the Love Canal Homeowners' Association/victims.

Group 6 will be the hearing officers from the EPA.

1. Get in your groups and together review and discuss the information in your role description, as well as the background information to help you understand the situation as these people would. Remember, you are role-playing, which means you are someone else giving views that are not necessarily your own.
2. Prepare to present your testimony (as it is called in the adversarial system) based on the information in the role description. Decide what is of the greatest importance or value to you. This you can not "mediate." Then decide what can be mediated as a basis for a resolution to the problem.
3. The mediation session will be explained by your teacher. Groups 1-3 should take notes on the process and content.

The time is February, 1979. The place is a school auditorium in the Love Canal area of Niagara Falls, New York.

Public Hearing Role Descriptions

Group Four: Government Officials.

City and state officials are all worried about who is going to pay the bill for moving residents out of the Love Canal. Also, there is the cost of cleaning up the area of the toxic wastes. This could run into millions of dollars.

Commissioner of the New York Department of Health: (You might want to draw a map on the board of the region.) Announce that the health emergency will extend to all homes in ring one, which are those homes adjacent to the canal on 97th and 99th streets south of Read Ave. You have found high incidents of birth defects and miscarriages. There will be immediate temporary evacuation of families with pregnant women and children under two. Those who leave will have to return when their children pass the age limit.

It is costing $8,000/day to house the families already evacuated. Everybody else will have to stay.

All families north of Read Avenue on 97th St. and 99th St. and Colvin will not be evacuated. You should ask them to please avoid using their basements and eating any food products which are home-grown. The county medical society will work with your department to determine what, if any, chronic or adverse health effects are being identified. Plans are being worked out for the clean-up of the area.

City Manager of Niagara Falls: The city has work under way to trench and drain the southern end of the canal. You are laying drainage tiles around the end of South Love Canal where backyards used to be. This includes the area around Frontier Avenue as well. You cannot get the chemicals out of the soil. To remove the chemicals is not cost-effective; it would cost $100 million. Instead you are treating the contaminated ground water by diverting it into 17-foot-deep wet wells. From there it will be drawn out and treated by filtering through activated carbon. After trenching and sewer installation, the canal will be capped with a layer of clay which slopes down. This keeps the chemicals in the ground from interacting with rain or surface waters. Good soil will be placed on top. Eventually grass will be planted, and a park will be built. The city has signed a contract with Newco Chemical Waste System to do this work.

Governor of New York: You have sent a bill to the state legislature asking for $5 million to begin the purchase of homes of any Love Canal residents who want to leave. You should assure them that you will do everything in your power to help the citizens get an equitable (fair) price for their homes. The houses fall in the middle-income range of about $20,000 to $50,000 apiece. You will have the houses appraised at a fair market price. The state of New York will pay for moving and extras such as installation of phones, etc. For those who want to come back, the plan is to move people back to Love Canal after correcting the problems that make the homes uninhabitable.

The state of New York will then negotiate with new buyers for a reasonable price for the houses. President Carter has met with you and has released Federal Disaster Assistance Funds. But the major costs will have to be borne by the taxpayers of New York. And that includes homeowners and workers in Love Canal as well. The costs will run in excess of $30 million.

Group Five: Homeowners' Association/Victims.

Lois Gibbs, President of the Love Canal Homeowners' Association: As president of this organization you have asked the public officials for information, answers, and help, which they have not given. You live two blocks east of the canal on 101st Street. Many of you work for the chemical companies and know you may lose your jobs; however, you also know you are losing your health and lives. You are speaking for all of those residents on the north end who must stay and for whom there is no provision to leave. There are problems in this region as well. For example, while trying to install a bathroom in his basement, Mr. Taylor broke a hole in the floor and a syrupy red fluid suddenly filled up the hole. He took some pails and filled them up with the mess. Before he could get them outside, his collie stuck his nose in. Cancer-like sores broke out on his nose. They weren't treatable, and they had to put the collie away because of the pain. The "syrup" was analyzed. There were C-56 and PCBs in the mess, which cause cancer.

Mr. Mosher is suffering cancer of the bone marrow. The Mosher family, like the Taylor family, live over a half mile from the "crisis" area; they are not considered to be in crisis. You have documented case after case of physical complaints that parallel the description of effects from these chemical poisons. You demand that the government help get *all* of you out and pay for your houses which have been ruined. The government has done that for the south side. What about the north side?

Dr. Beverly Paigen, cancer research scientist at Roswell Park Memorial Institute in Buffalo, New York: You were contacted by the Homeowners' Association. The members were worried about how many of the people left behind had the same illnesses that had prompted the immediate evacuation of the first group of ring-one homeowners. They worked under your direction to survey the entire region, trying to find a pattern to the complaints about various health problems. This is what you found. Families living in the wet areas, areas that had dried-up ponds or old-stream beds indicating ground water movement (swales), suffered the most. Of all pregnancies of women in this area, 25% resulted in miscarriages. Nine of sixteen children (56%) born to women living in this wet area had birth defects. You discovered high incidents of nervous-system, urinary, and respiratory problems. The number of cancers were non-conclusive.

You called the state Department of Health to report your findings. They seemed very uninterested. You later got a call saying that they had checked your wet-area or swale theory, and it was wrong. Had they agreed with the theory, they would have had to evacuate more families at a great cost to the state. But an official did call you much later and reported that a recent study had confirmed your theory. You are asking for more money from the federal government to move the people out of the high risk wet areas.

Michael Brown, Newspaper Reporter: You have been covering Love Canal for the *Niagara Gazette* for over two years. You began to be concerned with the possibility that Hooker had dumped wastes from the production of 2,4,5-T (trichlorophenol), better known as "Agent Orange," the herbicide used in Vietnam. An unwanted by-product known as tetra dioxin is lethal. It was learned in Vietnam that it causes birth defects and deformity. You called Hooker. You got confirmation that 2,4,5-T had been dumped but that no by-product, dioxin, had been discovered. Hooker had buried 200 tons of trichlorophenol.

A month later a state official informed you that dioxin had indeed been found when the drainage trench had been dug. Some of the residents wanted the city to stop digging the trench for fear of releasing the dioxin into the air. They protested by demonstrating. They were arrested and put in jail for disorderly conduct. You believe that Love Canal is the tip of the iceberg. Several more Hooker surprises have been discovered around this area and in other parts of the nation. What is the federal government going to do about this?

Homeowner on 97th Street just north of Colvin Avenue: You are a stockholder in Occidental Petroleum, the parent firm of Hooker Chemical. You went to the annual meeting because several of you had submitted a resolution: "to establish policies and procedures to safeguard our company from future environmental contamination and public health hazards that affect our company's profitability and viability." After introducing the resolution, you had a Love Canal resident relate to the stockholders and the executives how her son had died of a rare kidney disease. The chairman, Armand Hammer, then said that the company did "sympathize greatly with your predicament, but I would think what you should be doing is addressing your complaint to the city of Niagara Falls. . ." When stockholders, supporters of the resolution, got up to speak for the resolution, their floor mikes were turned off. Sister Joan Malone then asked Chairman Hammer, "Are you refusing to hear?" Hammer replied, "Yes, I am refusing. Go home to Buffalo." The company rejected the resolution. (Nader, pp. 298-299)

Political science department chairman, State University of New York at Buffalo: You are a recognized expert in the field of ethical behavior in society and government. You are testifying as a resident of Niagara Falls and as a citizen and human being concerned about ethical and moral behavior. You believe this crisis is not only an environmental disaster, but a crisis in moral behavior. You are concerned that Hooker Chemical has been responsible for this environmental disaster, yet its acceptance of responsibility has been non-existent. Hooker has paid nothing up to this point. It has refused to give out information that could have been helpful to the victims, possibly because of possible lawsuits.

From the selling of the land for $1 to the Board of Education, to the failure to inform, the history of Hooker's behavior and attitude has been that it was not their problem because of the clause in the quitclaim. It has legally been very clever. As individuals within Hooker, corporate executives are able to hide behind the corporate organization, thinking themselves free from any individual legal or moral responsibility. You believe they do have individual responsibility, since individuals make the corporate decisions.

And what about the citizens and the government agencies? Each agency has tried to push the responsibility off onto another level because of the financial burden and blame. They have withheld information, forcing citizens to exhaust every channel and resource available to simply get questions answered. The citizens have had to teach themselves what questions to ask and even how to ask. You commend the citizens for their persistence. You also commend the state and federal governments for their efforts in tackling this very difficult problem, which will tax the resources of everyone. Environmental problems, you believe, are everyone's responsibility as citizens, government officials, and human beings. Everyone uses the products that create the toxic wastes. Everyone suffers when toxic wastes are improperly introduced into the environment—through health effects, degradation of the environment, or taxes to clean it up.

Group Six: Environmental Protection Agency Hearing Officers (3 to 5 members).

One of you will be the chairman who conducts the meeting. The rest will ask questions and respond to questions. You will ask people to testify in the order that they appear on the role descriptions. Give each person about three minutes to present a formal testimony. Then any one of you may ask questions and try to clarify their position. If you wish you may ask for a response from the government officials.

Then at the conclusion of all of the testimony, meet in your group and write a recommendation. You must take into consideration the cost of any undertaking—who will pay the bill? Try to think of every long-range effect your decision will have on all of the parties concerned. If you feel there is no good solution, then take that position. But give reasons and justification for whatever position taken.

A NOTE TO EPA MEMBERS: You want to resolve this dispute between the homeowners and state of New York without the federal government having to assume more financial responsibility. The total cost will be $70 million by the end of 1980. Some $21 million will come from the federal government to pay for cleaning up the mess created by Hooker Chemical and the state of New York for failing to monitor Hooker. The President has declared Love Canal a federal emergency and has released Federal Emergency Management Funds. This only applies to the houses around the Canal on 97th and 99th Streets. You are considering the temporary resettlement of another 710 families. But the federal government cannot and will not buy the homes of these families, nor will the federal government take on any other expenses.

State officials have requested that emergency-response funds from the Water Pollution Control Act be used for Love Canal. This fund was appropriated by Congress to be used in the clean-up of serious water pollution problems. You cannot release these funds, because it would be setting a precedent for the hundreds of cities around the nation with equally serious problems. You are afraid Love Canal is only the tip of the iceberg. You are uncovering several dozen other sites of toxic waste disposal, many around here and other parts of the country, which belong to Hooker Chemical. Hooker Chemical has yet to pay for any of this. The U.S. Department of Justice is seeking a remedy. It has filed suit against Hooker Chemical to recover federal expenses. And the administration has asked Congress for legislation to prevent such a disaster in the future.

Handout 6

What Actually Happened

The recommendations handed down by the EPA were largely on the side of the residents but very guarded. They stressed that the study by Dr. Paigen was important and merited careful attention. The EPA evacuated some 2,500 residents from their homes. The homes were boarded up and abandoned, with the federal government paying some $30 million for the property. New York State spent $37 million. (Zipko, p. 30)

And what about Hooker Chemical? Once again it was the courts of law that provided some kind of justice for the victims of toxic waste poisoning. Approximately $16 billion in lawsuits were filed against the company for health and property damages. By 1983 they had made out-of-court settlements without admitting any negligence. (Remember, originally in the Minamata case Chisso would only make sympathy payments but not compensation. Later they had to acknowledge total responsibility.) In 1985 the state and federal governments were still in litigation against the company to recover the money spent on the Love Canal residents, their homes, their resettlement and the clean-up. When the company finally agreed to pay these costs, the lawsuits were dropped.

In 1980 Congress passed legislation which provided for a $1.6 billion Superfund to begin the clean-up of the most dangerous dump sites. The Superfund National Priority List had 951 sites identified as abandoned hazardous waste dumps. The Reagan administration's EPA announced that hazardous waste dumps posed "relatively low risks" and that it would spend less on Superfund clean-up. Congress disagreed in October 1986 and added another $8.5 billion to the Superfund. (Crandall, pp. 74-76)

In an industrial society, there will be pollution, damage to the environment, and risk to human health and life. Zero-risk is not possible in industrial societies such as Japan and the United States. There will be risk by simply operating any industry. This leads to the societal tension between the cost of prevention and clean up versus a level of acceptable risk and damage. Government agencies have had to address the need to set standards to reduce risk and damage. In setting regulations to meet standards they have had to determine subjectively what a life is worth and how much a clean environment is valued.

Too often, however, governments encourage industry into a region to provide jobs and look the other way when standards are violated. Citizens are silenced because of their need for job security. Who then, is watching out for human health and the environment?

Citizens, as in the cases of Minamata and Love Canal, cause and sometimes force government agencies to re-evaluate standards and regulations and to rethink priorities. Citizens, ultimately, are the watchdogs of governmental agencies as to how they direct, manage and maintain the social order. But what about industry? Do they have a responsibility?

This leads us to ask the following questions: What percentage of their operating costs should industries spend to ensure your health? How much additional cost for a product are you willing to pay to safeguard someone else's health? What about additional costs to prevent degradation of the environment by using cleaner but more expensive technology? And, how much of your personal earnings are you willing to spend to ensure a healthy environment for future generations? These are difficult questions. They require carefully thought-out answers.

Background Readings for Love Canal Case Study

This study relies extensively on Michael Brown's *Laying Waste: The Poisoning of America by Toxic Chemicals*, Chapters One and Two, pp. 3-59. All statistics and facts presented come from this source unless otherwise noted within the text.

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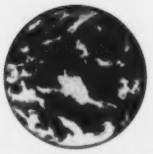

The Right to Sustainability

The American Future: Sustainable or Not!

Stanley R. Euston

On June 14, 1993, at a Rose Garden ceremony, President Clinton announced the creation of a 25-member President's Council on Sustainable Development. That same day Vice President Gore addressed the first meeting of the United Nations Commission on Sustainable Development, stressing the importance the new administration places on carrying forward both the spirit and recommendations of the United Nations Conference on Environment and Development, held in 1992 in Rio de Janeiro.[1] In his address, the Vice President said: "We can assume change is impossible, or we can be part of the solution and make change inevitable." And he added, "Public policy that gets input from everyone is better public policy."

It would seem that the United States may finally be on the path toward a sustainable future, a future in which people and nature interact in a dynamic harmony, and in which an equitable, sustaining social harmony is achieved. But if these new initiatives are hopeful, they are but a fragile start on a long journey. The reality is awesomely more difficult than the rhetoric. At the heart of the matter, we—individually and societally—are faced with an all important, ethically immersed societal decision: How do we choose to value the future of society? Long term sustainability as a society is dependent on answers to this question, answers that place far greater value on the future than has been the case to date. To sense the difficulty of the choices in practice, we only need look at our nation's "catch-up" history of environmental stewardship.

200 Years of "Progress"

The matter of a sustainable future is closely bound with the fate of the environment. A healthy environment stands as a necessary (though not sufficient) element of virtually any conception of a "good future." We are learning that a productive economy—one that can be sustained into the indefinite future, and one that does not exploit workers—is dependent on a productive environment. We sense that an ugly environment without any mingling with nature (such as exists in our decaying central cities) is degrading to the human spirit. And we know that with a severely degraded global environment, the doomsday scenario—an unraveling of life support systems on which we and other species depend—is not beyond the realm of possibility. In other words, the chances for a meaningful future hang fatefully on the chances for maintaining a reasonably healthy natural world.

Most of us are aware of the perilous state of the global environment. We find it helpful to look at rain forest destruction or overpopulation in the developing countries as cause for concern and action. And certainly these issues need attention. But we also need to be reminded of the our own history, that the North American continent has been altered almost beyond recognition, that American nature, plants, animals and ecosystems, have been repeatedly dealt grievous blows.[2] This destruction has taken place not within a desperately poor developing country or a despotic socialist society, but against the backdrop of our American democratic institutions, of our American sense of law and justice, of the most advanced science and technology, and of a remarkable long term prosperity sparked by a vigorous people supplied with almost a surfeit of resources.

In 1787, the year of the Constitutional Convention, settlement had barely spilled over into trans-Appalachia. One hundred years later, in 1890, the frontier was declared at an end. With it also disappeared what was perhaps the most extensive temperate hardwood forest in the world

Stanley R. Euston is President of the Sustainability Project, Santa Fe, NM. He has held a variety of positions in environmental planning and policy development, including Director of Planning, Southwest Region, Bureau of Outdoor Recreation, U.S. Department of the Interior. For further information on the civic dialogue network of The Sustainability Project write: The Sustainability Project, 4 Gavilan Road, Santa Fe, NM 87505.

(from the Appalachians to the prairies) as well as an immense co-terminous grassland environment including some of the world's greatest concentrations of herbivores, to say nothing of the cultures of native peoples that depended on this environment. These were replaced by a productive agricultural landscape dotted with towns and cities, but the loss of such an enormous number of natural environments in such a compressed time frame was historically unprecedented and ecologically devastating in a global sense. (Canada followed a very parallel path, under very similar institutions.)

Moreover, once that agricultural and industrial landscape matured, the inevitable deterioration of the environment progressively worsened. The burnt out soil of the cotton-growing South, the Dust Bowl calamities on the western plains, the continuing loss of topsoil on the most productive of our Midwestern agricultural lands—all stand as the legacies of our settlement patterns.

In the West, California experienced similar invasive pressures on its environment, particularly with heavy grazing and the introduction of exotic grassland species. But as late as the 1890s grizzly bears were still found in the wild San Gabriel Mountains, only 30 miles north of Los Angeles. In 1890, Los Angeles had a population of 50,000, and southern California could be fairly described as a semi-wild Eden where a Europeanized but still remarkable natural environment was in place.

One hundred years later, the Los Angeles Basin and much of coastal southern California can only be described as an environmental disaster area, sustained by thin lines of aqueducts that suck water from distant rivers and lakes to provide for more growth, while central city residents daily are exposed to the worst type of environmental insults. Seemingly oblivious to this experience, other western cities willingly follow the Los Angeles growth syndrome, and today we find Phoenix, San Diego, Albuquerque and other urban agglomerations draped in smog and sustained only by prodigious drawdowns on the natural environment and on the human spirit. And all this has occurred within the less than 100 years of the American Century!

From a synoptic view of two hundred years of history, our society, in spite of its spreading foundations of strong democratic institutions, has wrought unparalleled destruction on the natural environment, and in doing so also on those peoples least able to escape the effects of this destruction, first slaves and native Americans, and later those at the bottom of the economic hierarchy. This is the tragic underside of the great westward movement, the insistent exclamation point at the end of "O Pioneers!" It is a side of our American legacy that makes achieving a sustainable society based on equitable social arrangements and on a respect for nature so formidable; it brings nagging doubts to our most fervent discussions about the future.

Why has our society, generally resourceful in its ability to evolve new norms of moral, legal and institutional behavior within an untidy democratic framework, been found so wanting when it comes to an effective response to environmental destruction? It is not for a lack of prophets who have seen the future with clarity, nor have we lacked the potential for legal and institutional responses, at least not for the second half of this two hundred year environmental blitzkrieg. From the last quarter of the nineteenth century, heeding at least in a small way visionaries like Thoreau, Frederick Law Olmsted, George Perkins Marsh, John Muir, Gifford Pinchot, Aldo Leopold, and Rachel Carson, there has been an accelerating institutional awareness of environmental destruction. From early scenic and forest protection, to the flawed yet vital utilitarian vision of "conservation," to the environmental movement of the last 35 years, our legal and political systems have responded to an increasingly ecologically driven vision of environmental protection, while the scientific community has compiled data at an exponential pace on the remarkable and finely tuned interrelationships of people and the biosphere. Yet as we end the year 1993, it is no exaggeration to say that the American environment (and the global environment, for that matter) has never been in more jeopardy, and that the doomsday weapon may turn out to be a prosaic collection of atmospheric gases.

The Need to Value the Future

Why have our society and our institutions countenanced such a wholesale destruction of the environment, particularly after the turn of the century when the outlines of the detrimental effects of this destruction on future generations were clearly perceived? Why, in fact, do we, at heart, continue to tolerate it, irrespective of all the reforms of the environmental movement, when the evidence of future harm is now so undeniable?

The answer to the "why" question—why we have permitted a mostly unchecked martial advance on the earth—evokes a plethora of responses. But in this context, it is instructive to frame the question in terms of a societal perception of the future.

Simply answered, we have placed more value on our individual futures than on our common future. Not only have we thought in terms of individual futures generally, but our societal goals have historically been heavily weighted toward material values, and no more so than at present. We have staked our collective future on the creed that keeping intact private property for our progeny equates with a "good" societal future, that the "invisible hand" of individual and family self-interest works to the benefit of future society as it supposedly does to the benefit of the present. The rights of property were prominent in the natural rights dialogue of the seventeenth century, and they are a foundation of Lockean liberalism. Property rights are embedded both in the Constitution and in the American perception of a just society.

The problem is that passing on

individual material futures through property rights does not provide for a sustainable *common* future. The sum of individual futures is generally less than its parts. In other words, by adding all of our individual expectations, we are unable to meet our expectations as a society.

This is most easy to see when we consider the environment. In one respect, the environment can be described simply as a system of spatial and temporal interrelationships of immense complexity and nuance. Our legal system of property rights makes a limited accounting of these spatial interrelationships. It provides limited remedies for certain "spillover" effects (adverse effects on one part the system resulting from tampering with other parts, which are generically called "pollution") through the government's inherent authority to protect the public's health, safety and welfare. And common law legal devices bring some coherence to the management of common resources such as air, water and wildlife. (There are also constitutional justifications for pollution control and environmental protection.)

But when it comes to the long term temporal dimensions of environmental spillovers, the legal system becomes progressively less responsive to the common environment. The farther out in time the anticipated effects of environmental destruction, the more uncertain these effects become and the less likely that courts will heed arguments for circumscribing property rights in the long term interest of the environment.

This dilution of future-oriented environmental concerns is exacerbated by a market economy which, in its system of discounting the future, rapidly diminishes the future to nonconsideration. (For example, raising the discount rate effectively shortens the value of the "future" to nothing as far as economic decision making is concerned.) Since our legal system generally uses monetary value as a proxy for the value of all types of property, both economic and legal institutions interact in a perverse way to constantly narrow the time horizon of the future, and thereby devalue the future in decision making.

Certainly we have paid lip service to broader and less material community oriented future visions such as a beautiful and fruitful land, an equitable, just and virtuous society, and an ecologically diverse environment. Yet the specific institutional mechanisms to bring such visions to fruition have been largely ineffectual or nonexistent. To cite but one example, the history of urban and regional planning, supposedly a policy activity designed to factor the future into current decision making, has been a demonstration of our ability to imagine that we are thinking great thoughts about the future, while enacting minor reforms at the periphery of the property rights monolith. While the institutions of the law and the market economy direct our consideration of the future to an aggregate of present oriented, individualistic courses, there are few countervailing institutional impulses towards valuing the long term future, and the welfare of the land and society as an integrated whole.

In its individualistic/materialistic approach to the future, society has been unable to face directly the devastating effects that this internalized vision of the future has on the environment, and on the lives of citizens. Instead, as we have seen, society and institutions have devised reforms that mitigate the worst of these effects, thereby allowing us to maintain the delusion that we have "solved" the problems.

In general, nature remains a "resource" at our individual (or corporate) disposal, without "rights" or legal standing, protected only by concerted public action that from time to time saves a bit of land or successfully lobbies for pollution controls. While our legal system does recognize that air, water and wildlife cannot be perfectly "captured" by our system of property rights, and while our governmental institutions have supported management of some lands as public resources (or commons), these are relatively small ripples on a vast sea of privatized land and resources. Laws protect landscapes and endangered species and prevent cruelty to animals, but nature—its individuals, its species and its ecosystems—does not fall within the purview of the "inalienable rights" that loom so large in our constitutional heritage, whereas property rights clearly do.[3]

Private property conveys many good things to both individuals and societies. (John Locke's defense of property as a cornerstone of a prosperous liberal society still largely defines our societal attitude.) Property rights can encourage good husbandry of the land and care in its tending. Socialist land schemes have resulted in the worst of environmental disasters. But preparing for a good and sustainable future requires a more complete and integrated vision than the individual materialism of property. A sustainable society will require new ways to balance the good of property rights with the good of the environmental commons and the welfare of the community. The *responsibilities* of property need to be taken seriously, as a concomitant to the *rights* of property. If we do not give equal weight to these responsibilities, there is scant hope of attaining a future worth waiting for.

Visions of the Future

Like death and taxes, the future is unavoidable. Unlike death and taxes, the future involves an envelope seemingly rich in variety and potential. The future, at least in western conceptions, gives social meaning to what might otherwise be an incoherent jumble of bits of individual experience. The idea and the hope of the future binds billions of individual decisions into a whole that we as individuals perceive as a continuum of personhood, nationhood, culture and society.

In our American experience, this future has been particularly full of ideas of betterment and progress. Indeed, progress has been a constant in American political, economic and social thought from the beginning.

This idea of progress emanated from the liberal views of the Enlightenment, and was intensified and transformed into mythic dimensions by the frontier experience. As we have seen, hope in the future has been based largely on bettering our individual futures, most importantly our material futures secured through property rights. Individualism and progress have marched hand in hand, overcoming in the national psyche such wrenching communal traumas as slavery, the Civil War, world wars and the periodic depressions that haunt our economic life. Only recently has our view of the future darkened. (See, for example, *The True and Only Heaven*; Christopher Lasch; Norton: 1991. Lasch begins his voluminous critique of progress with the question: "How does it happen that serious people continue to believe in progress, in the face of massive evidence that might have been expected to refute the idea once and for all?")

A sustainable community or a sustainable business is an impossibility within a nonsustainable society

There have been different visions. Historian John P. Diggins sees a vital legacy in the repeated attempts to reconcile our historically dominant political and social models of self interest (as represented by John Adam's mistrust of civic virtue as a basis of government) with a larger moral vision of self sacrifice, community welfare and concern for the future.[4] The legacy of Lincoln, and his endless appeal to Americans and to the world, rests with that larger moral view. The American future, in Lincoln's view, did not lie with endless material progress but with a search for a moral vision. The cataclysm of the Civil War held the promise of redemption, of washing away the stain of slavery, and a reclaiming of the mantle of equality that was most perfectly expressed in the Declaration of Independence.

Henry David Thoreau probed deeply into the relations of the individual, nature and society. Thoreau saw very early that the material progress of America would not complete its nationhood. That completeness would only come with an enlightened individualism that was deeply embedded in the land. Again, the real issues were moral issues. To Thoreau, the state was inconsequential—necessary, perhaps, but generally unwelcome. Both he and Emerson gave us the best side of American individualism. (The messages of self sufficiency conveyed by both Thoreau and Emerson, standing squarely in the American tradition of individualism, are rich in ideas that synthesize personal realization and integrity with being-in-community.)

Thoreau exhibited an early but incomplete appreciation of Native American culture in its relation to the earth. Today there is perhaps an over romanticizing of the Indian way, but in its purest form it presents a vision far different from the property-oriented materialist view of the dominant culture. With western systems of property rights and legal contracts there comes power over both nature and people. Native American religion, as a central feature of their society, moves people into alignment with nature and therefore presages contemporary ecological understanding.

Indigenous peoples from around the world, after feeling the hard boot of western "progress," are organizing to maintain and regain some of their traditional practices that are at the heart of their world view. In terms of our dominant culture, the path to a sustainable future is more obscure, but its traces are there. The moral visions of a good society in harmony with nature and itself—a sustainable society—can be found in Thoreau and Lincoln, in Frederick Law Olmsted's practice of design with nature, in the awe of nature that moved John Muir to move a nation, in the progressive politics of Gifford Pinchot, in Liberty Hyde Bailey's vision of rural stewardship, in the call to a land ethic of Aldo Leopold, in the bold and prescient humanistic critique of technology, public design and institutions of Lewis Mumford, and in the visions of equality and harmony of Martin Luther King Jr.

Each of these visions—with many others—contains directions for reaching various paths to sustainability. Sustainability is so encompassing a paradigm that it is reasonable to talk about "paths" in the plural. Sustainability is not an objective function to be solved; it is a disposition to the future, a way of living, a direction for public decision making, to name a few of its potential manifestations. But these paths must be discovered by citizens in every walk of life, and in every part of the country. Not only must citizens find these paths, internalize them and make them accessible to the majority of the population, but they must concurrently take democracy seriously and act to renew our legal, governmental, and economic institutions, redirecting their course in countless large and small ways to the sustainability path.

Civic Dialogue and the Path to a Sustainable Future

On the Zuni pueblo in New Mexico, an Indian-managed sustainability project is working to restore degraded agriculture and rangeland. In Los Angeles; Seattle; Arcata, California; Sarasota, Florida, and in many other cities and communities, citizens are initiating efforts to steer their localities towards a livable and sustainable future. There is a growing network of sustainable agriculture working groups; churches and religious communities of all denominations are in dialogue about the ethical and spiritual dimensions of living in harmony with nature; numerous grass roots organizations are experimenting with approaches to small scale food production, forestry and manufacturing; environmental justice is becoming a concern of main line environmental organizations; corporations are experimenting with environmental auditing and total environmental management systems; and the United Nations

Commission on Sustainable Development and the President's Council on Sustainable Development are in operation, following up on the historic United Nations Conference on the Environment and Economy.

From innumerable perspectives and in diverse venues, people are now struggling with what is perhaps the central societal, political and ethical question of the late twentieth century: What is a sustainable society and how do we achieve it? And as we proposed earlier, to answer this question we must confront the underlying ethical decision of how we as a society should value the future. The spontaneous efforts now underway both in this country and globally indicate that the public perceives a future that is in jeopardy. But the most enlightened on-the-ground efforts at sustainability will gain little unless societal institutions of all kinds change direction. A sustainable community or a sustainable business is an impossibility within a nonsustainable society.

It is apparent that the move toward sustainability (and the move of our institutions toward sustainability) requires a public dialogue of unprecedented scope, depth, seriousness and diversity. After all, sustainability is arguably a new paradigm leading to a profoundly new (and renewing) vision for the nation. Far more than a mere policy initiative, far more than what politicians often call "the vision thing," sustainability gets at the heart of the imbalances plaguing society and our political institutions.

The sustainability paradigm is not about technical solutions or expert answers as much as about people living their lives in a new way. While the scientific basis of environmental and social sustainability is indispensable, the more difficult issue is the cultural one. People must understand the problems, and they must be willing to construct the solutions. Expertise will be essential in this process, but citizens will, in the final analysis, decide. Solutions that do not relate to people's everyday experiences will fail, as many far less profound "reforms" have failed before.

The current context for facilitating and promoting this national civic dialogue is not without its difficulties. The traditional means are creaky in their encrusted and stalemated patterns. Our political institutions are held in low esteem, as is the media. Political parties are less and less capable of articulating and carrying out programs. Voter turnout remains abysmally low, especially among younger voters, who have the greatest stake in the future. The public decision system is already overloaded with issues of national debt and health care, yet the discourse on these urgent and future looking initiatives is painfully inadequate. It is squeezed into sound bites, saturated with language that robs words of any semblance of their conventional meanings, and full of posturings and propaganda.

If America's civic discourse is at a low point, it has had a high point. A remarkable future-oriented civic dialogue took place in a space of perhaps 25 years, from before the Revolution to the time of the state ratifying conventions. The results of that dialogue were the nation's independence and the Constitution. It used no e-mail, no telephones, no instant communication of any type. There were no televisions, public relations consultants, or spin strategies. There were newspapers who published libel as well as what became know as the Federalist Papers. There were private and public letters written with quill pens. There were meetings and remarkable legislative debates and what we would now call back room negotiating. The relatively few who participated in this dialogue were a very narrow segment of the population, generally well-to-do white males. The one source of what we might call diversity was that young people in their twenties and early thirties participated, together with Ben Franklin in his eighties. And the diverse geography and customs of the new country were certainly represented.

The ideological language of the Revolution was clearly exaggerated in its portrayal of the injustices of the British. But in was not propaganda by our twentieth century definition, for it never strayed far from using words in their common form, meaning and context. That language was also successful, in that it carried both a rational persuasiveness and an emotive weight that, when combined, caused citizens to act. The great debates that led to the Constitution, it must not be forgotten, were debates. The Constitutional Convention was not a tribunal of disinterested men. Sectional and class rivalries as well as personal contentiousness permeated the proceedings. Yet it is hard to read Madison's notes from the Convention or the *Federalist* defending the Constitution without a sense of awe. Whatever their momentary motives, these men saw through time, and the dialogue that culminated in the founding of a nation on democratic principles stands as a sobering example of the power of words and ideas to orient institutions and society to the future.[5]

Our age cannot duplicate the constitutional era, even if we wanted to. We have no small cadre of citizens who can chart our future. The discourse of today is more complex and diffuse (though not more cogent) by orders of magnitude, and the diversity of our population is vastly greater. But the example of these times is relevant to those who believe that the move towards a sustainable society can only begin when *words and meanings about values and the future are carefully analyzed, debated and clarified*. This means a dialogue that includes all segments of society, and that includes both the rational and scientific background to our global predicaments, as well as the emotive and moral dimensions of the issues. Above all, the meaning of language must again be taken seriously in civic and political dialogue.

National Civic Dialogue: One Scenario

The civic dialogue on a sustainable future will take many forms. It will involve various media and formats, from popular to technical. It will involve many people from many backgrounds. It will bring to the issue diverse viewpoints and perspectives. It will explore the broadest philosophical and ethical dimensions of a sustainable society. It will analyze the institutional basis for non-sustainability. And it will develop and promote innumerable ways and means for bringing sustainability into practice on the land, in business and in community. Clearest of all, it will most certainly move in ways that cannot be predicted.

The following scenario imagines one way this national civic dialogue might come to pass:

After lengthy deliberations and very active citizen input, the President's Council on Sustainable Development has announced a plan for facilitating a National Civic Forum on a Sustainable Future. The plan calls for appointment of a Civic Forum Round Table representing many perspectives—scientists, educators, religious leaders, minority organizers, scholars from the humanities and the social sciences, writers, artists, farmers, small business people, corporate leaders, labor leaders, journalists, environmentalists and just plain citizens. The Round Table is to develop a series of publications, videos and educational materials that presents in a clear and objective manner the outlines of our global environmental predicaments, the social and economic implications, and the "big picture" choices we face as a nation. It is commissioned to hold a series of town meetings in every part of the country to register reaction to these materials and to gather suggestions for institutional and policy changes. It has been asked by the Vice President to develop strategies for engaging the political process in dialogue on the ways and means for moving toward a sustainable future.

The Civic Forum Round Table, mindful of its namesake, invited Vaslav Havel of the Czech Republic to address its opening session. A bit later, PBS and Turner Broadcasting entered into a joint agreement to develop a television series, hosted by Bill Moyers, that chronicled the nation's fall into nonsustainability and presented visions and strategies for turning to a new course.

The Plan also encourages through grants and technical assistance civic forums in all 50 states through either non-governmental or governmental auspices.

Within several months more than half the states had organized forums involving literally thousands of participants, about half of those under non-governmental sponsorship. This participation was well beyond expectation. The feel of an active democracy was in the air. The lukewarm support or even opposition of some politicians only served to increase citizen support. Encouraged by the state activity, hundreds of communities redoubled their efforts to devise practical future oriented environmental/economic/social strategies.

But this governmental activity was only the impetus for a much more extensive grass roots approach to sustainability. Discussion groups proliferated in churches, schools, community centers, and in living rooms. Not unusually, these groups carried dialogue into action, initiating and supporting sustainability projects both at the public and nongovernmental level. Civic festivals and art and music events added immensely to the understanding of our bonds to nature, and such creative energy even occasionally spilled over into the halls of bureaucracy.

The educational system was not an early entrant into the sustainability dialogue. But here and there innovative and persistent teachers made an early difference. They took seriously the crises that society was in and the potential for using sustainability as an organizing theme for curriculum development. Before long, elementary and secondary education, both public and private, were introducing the issues to the young, to those who had the greatest stake in the future. Several colleges and universities developed academic programs in sustainability. These programs from the start were highly interdisciplinary, and quickly attracted a group of talented and dedicated students. Other universities pursued future studies, sometimes in a highly mathematical way. The contributions of these efforts to the intellectual dialogue were indispensable.

In retrospect, the seed had been planted. Slowly at first, but then steadily, the nation's attention became focused on hope in the future. A spirit of democratic participation was reinvented. The future is still not certain, but it is now more hopeful.

Lest some think this exercise pure fantasy, it should be noted that nearly every part of this scenario is in effect in at least a small way right now in this country. And in Canada, for several years now, citizens been engaged in a national dialogue on sustainable development through a series of national, provincial and local round tables. (It should also be noted that no more fitting person than Vaclav Havel could have made the opening address to our hypothetical Civic Forum Round Table. Havel has faced the challenge of renewing and transforming an environmentally degraded country which has just emerged from a totalitarian nightmare. He has done this with a moral vision rare in our time.)

Epilogue: Education for A Sustainable Future

Dialogue is the original model for interactive education. To participate productively in dialogue, one needs to understand the outlines of the factual and technical bases of the conversation. One needs to bring to the dialogue an ability to bridge ideas, and to synthesize concepts. And one must be able to think critically. Thus, before the education *of* dialogue is introduced, there is need to educate *for* dialogue.

The traditional American idea of education for citizenship now takes on a far wider meaning: education for active participation in our local communities where many sustainability initiatives will take place; for understanding the bioregional context of our communities; for effective partici-

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Teaching Strategy

The Seventh Generation
A Mock Hearing

Gayle Mertz

Objective

The mock hearing outlined below will ask students to consider what, if any, legal responsibility this generation, or past generations have to insure that future generations will live in an equally safe, abundant, and stimulating environment.

Background

Every day populations living on planet earth become increasingly aware of environmental dangers, escalating threats to our health, and the consequences of inequitable distribution of the natural, economic, and social resources. Consider the following: forests are vanishing at a rate of 17 million hectares per year, an area about half the size of Finland; a minimum of 140 plant and animal species become extinct each day; one in three of the world's children is malnourished; over 1.2 billion people lack safe drinking water; more than 100 million children of primary school age are not in school; and one million women die each year from preventable reproductive health problems.

Planning for the future has traditionally meant thinking about next week, next year, or the next decade. All too often our vision has not extended to planning for the future of our planet or generations to come. Issues related to the use and allocation of resources have historically been considered on a local level. We are just beginning to take seriously the global implications of our actions or inactions. While international cooperation on environmental protection is growing rapidly (in the past 25 years over 150 environmental treaties, covering a wide range of topics, have been adopted), these fledgling endeavors have been handicapped by limited resources, unclear jurisdictional responsibilities, and lack of enforcement capabilities.

There is growing concern that future generations will be denied the opportunity to experience the diversity and purity of nature as it exists today; that they will suffer the ill effects of ecological and environmental damage; and that they will be deprived of the rich cultural resources that abound today.

Some Native American nations and individuals make decisions based on the effect that decision will have on the "seventh generation" to follow them. Trees are planted for the seventh generation and waterways are kept pure for the same purpose. Few cultures follow this, or similar practices, thus raising the question of who is responsible for protecting future generations. Or should we even concern ourselves with people who may or may not exist in the future?

Procedure

1. Select five students to serve as judges in an International Court. Each judge will represent a different country: (1) a large, wealthy, industrialized nation (2) a large, poor, industrialized nation (3) a small, poor, third world nation (4) a developing, democratic nation and (5) a monarchy with rich natural resources. (If time permits, judges can research the history, politics, and environmental policies of real countries that fit the description of the nations that they represent.)
2. The Society for Sustainable Natural Resources is asking the court to issue an order which would halt any activity, whether by an individual, organization, or nation, that is known to diminish the quality of the environment. They are asking that the court act on behalf of future generations who will suffer damages as a result of such activities since they cannot now act on their own behalf.
3. Select students to testify before the court. They may assume some of the roles described below, or develop their own roles. The number of witnesses and the length of time that they are allocated for their testimony will depend on time and resources available for this activity. Students should be given time outside of the classroom to conduct research and expand upon the roles described below, or to develop their own witness role.
4. Each witness will have an opportunity to address the court. Encourage witnesses to develop any audio visual aids which might bolster their testimony and allow them enough latitude to develop their own line of thinking or argument. Judges may question the witnesses about their opinions or about any of the evidence that is presented to them.
5. Once the testimony concludes, give the judges sufficient time to deliberate. At this point, it would be helpful

Gayle Mertz is Director of the Safeguard Law-Related Education Program in Boulder, Colorado.

to have a resource person trained in the law explain the legal principles relating to "standing" and "guardianship." Tell the judges that they will be asked to rule on the following questions:

(a) Do future generations have standing to sue? (Standing to sue means that a plaintiff has a legally protectable and tangible interest at stake and that the plaintiffs have either been injured or are threatened with injury.)

(b) Should the court appoint a guardian to represent future generations? Who could fairly represent the interests of future generations? (Guardianship is a legal arrangement where one person, the guardian, has the legal right and duty to care for another person, or persons, and their property because of that person's inability to legally act on their own behalf. A *guardian ad litem* is a special guardian appointed by the court to represent an infant, ward or unborn person in a specific litigation.)

(c) Who should the court appoint to appropriately represent the interests of future generations?

(d) If the court decides that it will intervene in the interests of future generations, who should it select to determine what activities are currently putting environmental sustainability at risk?

(e) If the court rules that it will intervene, how long should this intervention last?

The judges may issue a written or verbal opinion jointly; or if there is no consensus, individual opinions should be delivered to the class. The opinion/opinions should include an explanation of the judges reasoning in arriving at the decision.

(Note: Since this activity is based on futuristic concepts and not on any existing international court or body of international law, court procedures and interpretations of law are not rigidly set and can be left, within reason, to the creativity of the group working on the activity.)

Witness roles

Historian: This witness will argue that national charters, constitutions, franchises, and proclamations promise health, safety, and prosperity for future generations. It is a longstanding and highly valued goal of civilized peoples to voice their commitment to the unborn. The witness will impress upon the court the necessity of acting now to insure that this tradition, one that is universal to all humankind, continues.

Industrialist: This witness will argue that industry has significantly improved the quality of life for all citizens of this planet. The inconveniences of pollution and diminished diversity of plant and animal life are a small price to pay for the many modern conveniences that we enjoy today. The vast array of affordable and technically advanced products available to consumers makes our lives more pleasant, more comfortable, allows more leisure time with our families, and enables us to live longer.

Biologist: This witness will explain the necessity of maintaining biological diversity. While we do not know how many life forms humans share the planet with, roughly 1.4 million species have been identified. Scientists believe that there are between 10 and 80 million life forms on earth. We do not know the role that each of them plays but we do know that like every species, ours is intimately dependent on others for its well-being. On many occasions, creatures, or plants thought useless or harmful have been found to play crucial roles in reducing erosion, aerating soil, and curing disease. We do not know what the consequences are of depleting these life forms and we must be concerned about depriving future generations of their benefits.

Indian spiritual leader: This witness will explain the urgent need to restore the world environment to harmony. The Earth is our spiritual mother, a living entity that maintains life, and any threat to the environment endangers us all. We do not view the land as a collection of resources that require development. Instead, we view the resources as living entities to be honored with ceremonies of thanksgiving. This leader will tell the court that all cultures, all nations, all peoples must begin to quickly protect the vanishing bounty of Mother Earth. They must transform greed into sharing, material wealth into spiritual well-being, and individual enterprises into collective will to assure that there will be a clean and safe home for future generations.

United Nations Environmental Programme representative: This witness will tell the Court that the overall state of the global environment is continuing to deteriorate at an alarming rate. Existing treaties often prove ineffective, and in many cases, there are critical environmental threats where no treaty exists at all. At this time no organization has the authority to monitor or enforce existing treaties, and many treaties remain unratified. Until such time as we can verify that treaties are being complied with, and additional treaties are entered into, we cannot feel confident that we are leaving a safe and habitable environment to our future generations.

Naturalist: This witness will tell the court about the threat that industry and overuse poses to unique natural environments. Overgrazing, oil spills, and mining have contributed to the loss of some of the most beautiful land known to humankind. While these areas can never be reclaimed, we can act now to prevent any further destruction of the beauty that future generations have as much right to enjoy as we do.

Senior Citizen: This witness will draw on his/her personal experience stretching back over 100 years. The court will hear this witness testify that he/she remembers many times when we were warned that the world was going to end, that we would not survive nuclear bomb testing, or the use of pesticides. Yet this witness has lived a long and healthy life and feels confident that the earth will sustain human life forever.

The Right to Sustainability

What Citizens Can Do: A Case Study in Environmental Activism

Nancy Bartlit, John Bartlit and Michael Williams

...this most excellent canopy the air, look you, this brave o'erhanging firmament, this majestical roof fretted with golden fire, why, it appears no other thing than a foul and pestilent congregation of vapours.

— Shakespeare, Hamlet, II, 2

Over the years, citizens groups in many communities have played an important role in shaping governmental policy. As public concern and awareness of environmental issues grows, the influence of such nongovernmental organizations (NGOs) is increasingly being felt at the local, state, regional and, in some cases, at the national level as well. This article tells the story of one such group, the New Mexico Citizens for Clean Air and Water (NMCCA&W).

To gain an understanding of the role such groups can play, consider for a moment the figure of Justice. This familiar personification has meaning far beyond her origins in Greek and Roman mythology. She is not, you see, like Diogenes, a tracker of truth by lantern light. She is blindfolded, and while she may often be knee-deep in facts, she cannot discern them; she can weigh only what others load upon her scales. The adjudicatory process used to establish public policy, as we will see, operates in much the same way.

What can NGOs do? They can help ensure that the scales are properly balanced, and bring to the policymaking process an important perspective which would otherwise be lacking. When they can combine public support and scientific expertise, they can establish major policy initiatives. They can help put raw scientific facts and economic projections in a context that is meaningful and comprehensible. Their presence at the bargaining table can produce a more thoughtful and valuable discussion and free government agencies to act in accord with their own best judgement. They can help industries who want to protect the environment. Without their influence, frequently, the dirty industries will have a competitive advantage over those trying to do the right thing. NGOs can also make it possible for a responsible company to defend its cleanup actions to its own stockholders. Simply stated, nongovernmental organizations can help society to achieve an appropriate balance between the environment and product prices.

The Beginnings

When we formed New Mexico Citizens for Clean Air & Water about 25 years ago, we didn't have a clear idea what we were going to do or how we were going to do it. We did, however, know the problem we wanted to solve; there was a visible haze that a lone airplane pilot, tracking the plume, had traced to the Four Corners Power Plant, the first of several large coal-fired power plants to be located in the Southwest. There were also new sources of pollution slated for our state. Our goal was to prevent new air pollution and clean up existing sources.

On many days, we could see a layered haze which obscured the mountains across the Rio Grande Valley. Layered hazes are not that uncommon, but these had some important differences. Frequently, there was relatively clean air below the haze layer which suggested that the pollution had been transported into the Rio Grande Valley from elsewhere. Later, studies confirmed that at least some of the haze originated from a coal-fired power plant. Samples were taken by aircraft on nine hazy days. In four of the samples, tiny spheres—characteristic of fly ash from a coal-fired power plant—dominated the samples. In a fifth sample, there were approximately equal amounts of the tiny spheres and irregular particles characteristic of wind blown dust.

NMCCA&W was fortunate to have a wide mix of people from vary-

Nancy Bartlit is a volunteer who has served on national boards and is a former local public official. John Bartlit, Ph.D., is a chemical engineer at Los Alamos National Laboratory. Michael Williams, Ph.D., is an atmospheric scientist at Los Alamos National Laboratory.

ing backgrounds involved in its leadership. Among our leaders were a writer, a few scientists, a number of retired persons, housewives with professionally useful supportive skills, a private airplane pilot, proofreaders, editors, public relations people, and so on. Some of us had experience with environmental activism while others did not. We thought that we needed a large organization with inexpensive membership fees which was focused solely on clean air and water. Such an organization, we felt, could make its voice heard in the state legislature; and so the New Mexico Citizens for Clean Air & Water came into being. What followed was 25 years of environmental activism, marked by many battles—some lost, some won—and ultimately cleaner air in New Mexico, the Southwest, and in the rural areas of our country. In the process, we learned a great deal about how the governmental systems work and what NGOs can contribute to the formulation of policy issues.

Our first step was to elicit help from a New Mexico state legislative committee. However, at a meeting in 1968 we found that the legislators were much more interested in saying kind words to the plant's owners, the Arizona Public Service Company (APS), than they were in listening to us. As a result, we turned to other means: letters to the editor of newspapers, talks to clubs and organizations, and a well-publicized forum with company officials sponsored by the League of Women Voters. The scientists among us searched the technical literature for information about the effects of pollution and the possible techniques for controlling pollution.

The First Debate

In the meantime, APS officials, including its president, William Reilly, assured the public that the pollution was innocuous, rarely reached the Rio Grande Valley, and that the company was doing everything possible to control the pollution. They also suggested that stringent levels of control would force them to build their new plants in other states.

At about this time, the Parsons and Whittimore Company proposed to build a new pulp and paper mill in the Rio Grande Valley. Many New Mexico residents were familiar with pulp and paper mills elsewhere and were determined not to repeat the experience here. The company argued that their mills were not like other dirty pulp mills and pointed to a "clean" mill in California as an example of what could be achieved with modern technology. However, when we contacted residents near the California mill, we got a much different description of the paper mill. They told us that the mill's operation frequently resulted in unpleasant smells that were a problem in the community.

Parsons and Whittimore further boasted that they had built a modern mill in Mexico City, and that the former president of Mexico lived nearby and never complained of any ill effects. Once again, we checked out the story, and learned that it was true, up to a point; the company neglected to mention that the former president had lapsed into a coma shortly before the plant began operation and had yet to regain consciousness.

As the level of debate increased over the mill and the power plant, a new forum for discussion arose. In 1967, New Mexico passed a state clean air act and, two years later, scheduled hearings to consider a wide range of standards and regulations necessary to implement it. Regulations define the legally allowable emissions from facilities, while ambient standards define the magic legal dividing line between clean air and dirty air. In theory, regulations are supposed to be sufficiently stringent that the standards which apply at ground level where people breathe the air will be achieved.

Prologue to the First Hearing

Before the initial hearing, the debate became more focused. Those of us with a science background identified available information on levels of control of particulate matter and levels that interfered with visibility, and developed information on the emissions from the power plant. The controls at the plant were primitive and the coal was dirty. The estimated emissions, based on the coal's characteristics, were about 350 tons of particulate matter per day. The term particulate matter includes any small particles or non-water droplets suspended in the air. Fly ash from a power plant is one kind of particulate matter, while wind-blown dust and sulfuric acid mist (which forms acid rain) are other kinds. Our research showed that other power plants were achieving particulate matter removal efficiencies of over 99%; at Four Corners, however, the older units were achieving about 80%, with the newest and largest units expected to achieve 97% when they came on line. While at first blush 97% appears close to 99%, a 97% collector lets three times as much material escape to the environment as does a 99% collector. This is the difference between 30 tons and 100 tons of particulate emissions per day.

Both sides attempted to give some meaning to the numbers. The company cited the size of the collector, "bigger," it said, "than the Farmington city hall" and its cost, "millions of dollars." We countered that the ash released to the atmosphere in a single year equaled the volume of "six city halls." What had the most impact, however, was our discovery that the entire city of Los Angeles had estimated particulate matter emissions of only 110 tons per year. The idea that a single facility could emit three times as much particulate matter as one of our smoggiest cities was repugnant to many people.

Before the hearing, state health department staff proposed a regulation which would require over 99% control of particulate matter from large, coal-fired power plants. They also proposed a strict ambient standard for the sulfur compounds emitted by paper mills. We supported the state, while, as was to be expected, the industries proposed much looser regulations.

The Four Corners Power Plant before controls.

Round One

The state law had been written by attorneys, with considerable input from business interests. One key provision allowed anyone to examine any witness during the hearings. Immediately, attorneys representing business interests bore in on hapless state witnesses. The state climatologist, for example, was so intimidated that he was unwilling to say anything about pollution. He was even unwilling to agree that high emissions were more likely to cause pollution than low emissions. One result was that we became angry and determined that those testifying in support of business interests would not go unquestioned. Corporate presidents were asked about pollution controls and costs, and we frequently found them to be poorly informed about air pollution and its controls.

Naturally, the corporate interests brought in a number of very knowledgeable outside experts. However, they proved to have chinks in their armor which we could exploit. One expert gave lengthy testimony contending that 97% was the very best control that could be achieved with an electrostatic precipitator. One health department staffer asked what would happen if you put two 97% precipitators end to end. The expert's answer: over 99% control but less than 99.9% control. We found that cross examination worked to our advantage, since in many instances we were able to use the expert witnesses' credentials to support our position, helping us to establish some key points in the hearing record.

Another industry witness, nationally-known in the field of air pollution, argued that a particulate matter standard of 150 micrograms per cubic meter ($\mu g/m^3$) above background would be appropriate as an annual average. The figure represents a very high level of air pollution. Even without the additional amount equal to the background, this would result in a visual range (the greatest distance at which a dark object can be seen against the sky) averaging 6 miles. In his opinion, the visibility at this level would be fine, since it would allow one to drive a car or fly an airplane. He proposed to define background as the concentration which occurred less than 5% of the time. By this definition, the "background" could already include significant pollution and could increase with time. This would make the proposed standard even worse.

This argument proved unpopular with those people who said they were sometimes unable to see across the Rio Grande Valley. Many recalled that in the past they could easily distinguish features on the Sangre de Cristo, a mountain range some 35 miles across the valley.

Other people testified that clean air and good visibility were important to them. A developer who designed upscale housing developments described the importance of clean air and distant vistas. Officials from Los Alamos National Laboratory noted that clean air and scenic vistas were selling points in recruiting and retaining scientists.

The hearings lasted more than a week and turned out to be a bonanza for the court recorder, generating more than 1,300 legal sized pages of testimony and stacks of exhibits. Our somewhat amateurish cross examinations added considerably to the length, which probably explains why the court recorders were always very cordial to us.

The Decision

Eventually, the state health board waded through the voluminous documents and adopted regulations which required over 99% control of particulate matter, set stringent ambient standards for sulfur compounds from paper mills, and adopted stringent regulations for paper mills. In the aftermath of the adoption of the regulations, the utility announced that a "breakthrough in particulate matter control had occurred" and they installed controls with an efficiency of over 99%. In addition, the paper mill company dropped out of sight. From our perspective, the hearing served to establish recognition and credibility for NMCCA&W, demonstrating the importance of citizen participation is in defining the values people attach to visibility and clean air. NMCCA&W also played a vital role as a counterbalance to business interests, which helped spur state officials to take strong actions.

What Was Gained

A much different atmosphere existed after the hearing, as industry saw us in a different light; now we spoke with engineers rather than press agents. We also found ourselves being occasionally consulted on specifications for control equipment.

There was, however, much work yet to be done. Plans were announced for a major expansion in coal-fired power plant capacity in the Southwest. It was also clear that the new 1970 federal Clean Air Act would do little to protect visibility. As our level of knowledge and expertise grew, we recognized the importance of gaseous pollutants, particularly sulfur dioxide. While sulfur dioxide in its pure form has no effect on visibility, once in the atmosphere much of it is converted to particulate sulfates, which are responsible for much of the reduced visibility throughout the country. Most sulfur emissions in the Southwest originate from copper smelters and coal-fired power plants.

We urged our fellow conservation organizations, many with similar concerns, to help us protect the visibility in the Southwest, the clearest in the 48 contiguous states. This region also has one of the nation's largest concentrations of national parks, giving added force to our argument that the proposed federal standards would permit the visual range to shrink from its 80 mile average in the Southwest to only 15 miles.

The Fight Over PSD

The 1970 Clean Air Act defined as its goal the protection and enhancement of air quality. However, the EPA was clearly focused on the problems in urban areas by refusing to permit new polluting industries in cities. One consequence was the exporting of pollution to rural areas. While we didn't care for this approach, since it resulted in contamination of the countryside, the major cities didn't like it either because it meant an export of jobs to rural areas. The Sierra Club and other groups filed suit against the EPA, contending that its implementation of the 1970 Clean Air Act was inconsistent with the stated goals of the act. Many states and other organizations, including NMCCA&W, joined as amicus curiae to the suit. The U.S. Supreme Court ruled in our favor, and directed the EPA to develop regulations which would "prevent significant deterioration (PSD) of the air." EPA adopted regulations which restricted the increase in ground level concentrations of pollution in areas currently cleaner than the standards, providing much more stringent regulations for so-called Class I Areas, such as large National Parks and National Wilderness Areas.

Industrial and business interests then launched a major campaign to amend the Clean Air Act to eliminate the PSD provisions. Environmental groups counterattacked. Congressmen toured the Southwest and saw first-hand what was at stake. Industry consultants argued that PSD would shut down the country, while we argued that the use of ground-level concentrations for regulatory purposes failed to protect against visible plumes produced by large emissions from tall stacks. We also argued that the installation of better pollution controls meant more jobs. Ultimately, Congress adopted the 1977 Clean Air Act Amendments, which included the PSD regulations and added a specific clause to protect visibility in Class I areas. Of course, NMCCA&W by itself would not have been able to achieve passage of the PSD and visibility amendments, but by joining with other environmental groups, we were able to help get the job done.

We were also active at the state level, playing an important role in amending state law to explicitly include visibility as a resource that merits protection. In the political arena, we published a newsletter with the environmental voting records of the candidates. Although we deliberately did not endorse candidates, we worked hard to get good environmental positions included in the platforms of both major parties. We also played a role in another air quality hearing which set stricter controls on particulate matter emissions. Visibility considerations played a major role in this hearing.

Once More Into the Breach

We then moved on to a more difficult issue: the control of sulfur dioxide emissions from large coal-fired power plants. In the Southwest most facilities burned low sulfur coals, which meant that the federal emission regulations had little effect. However, many facilities were large, generating 2,000 megawatts or more, causing substantial sulfur emissions. Since controlling sulfur emissions is more expensive than limiting particulates, the task was a more difficult one. The only tool available to force reduced emissions was the ambient standards; if we could show that the ambient standards were being exceeded, we could use the law to force new regulations to control sulfur emissions.

When a hearing was set, the industry proposed a 60% control efficiency, while we argued for much tighter control based on recent studies of the dispersion effect that is seen in the mountainous West. In this instance, the state regulatory agency sided with the industry. With the help of a young attorney named Grove Burnett, we developed a very effective case, presenting testimony on air dispersion and the costs of control. The industry argued that it would cost hundreds of millions of dollars to control sulfur emissions, but we were able to show that those costs amounted to less than a dollar on an average consumer's monthly electricity bill of $70 (see the article by John R. Barlitt, "Putting Environmental Economics in Perspective: Case Study of Four Corners Power Plant, New Mexico," appearing in the American Journal of Public Health, Vol. 69, no. 11, pp 1160-1163.) We stressed the damage that would result from diminished visibility and argued that a cost/benefit analysis supported stricter emission controls.

An important plus for us was that our in-state utility, Public Service Company of New Mexico (PNM), had already decided to put 90% controls on their coal-fired power plants. A survey of their customers determined that they were willing to pay higher electric bills to keep their skies clear and blue. Thus New Mexicans were paying for clean power while the other customers of the Four Corners Power Plant in California and Arizona were not. California regulations would not permit such high emissions. We argued that coal-burning plants could be made almost as clean as natural gas-fired plants which were permitted in California. Even with very good controls, coal-fired power would be much cheaper than gas-fired power.

The hearing took a week, with Arizona Public Service spending over $250,000 to present its case while we spent a paltry $2,500. When the board announced its decision, rather that setting standards, it found that it needed more information and set a reopening of the hearing for a later date. After the second hearing, APS offered to improve control and establish a substantial monitoring program. We accepted their proposal, and developed a substantial monitoring protocol, but during the key test period, the utility operated the plants at very low capacity and as a result little useful data was obtained.

The utility argued that the test results proved that little control was needed and asked for a new hearing to modify the standards. With the help of pro bono services provided by a major Chicago-based law firm, we filed suit for breach of contract. Negotiations followed, and resulted in a settlement in which the utility agreed to tighten controls, pay for our legal fees, establish a fund for future actions.

Informing the Process

Legal forums are not necessarily the best vehicles for developing full information. In fact, many practitioners are of the opinion that they have exactly the opposite effect. Our experience showed that the following techniques were valuable in helping to increase public and regulatory understanding of the relevant facts:

- quantifying emissions (in tons per day)
- comparing emission tonnages with emissions from other cities and sources
- quantifying control efficiencies (percent removal) to debate industry's general statements that their plant "has pollution controls"
- citing specific similar plants operating at higher control efficiencies
- contacting manufacturers of pollution control equipment for information
- putting total (30-year) costs of control into perspective (as a percentage increase in total cost of power production)
- quantifying jobs created by installation and operation of pollution controls
- quantifying increased tax base due to value of installed pollution controls
- comparing "legally acceptable" visibility to actually experienced visibility conditions (for example, seeing a particular mountain from a particular town or park; visibility reduced by actual forest fires, such as the Yellowstone fire)
- reading industry articles or statements published in industry journals and contrasting this information with statements by the same industry or company given at regulatory hearings
- issuing joint press releases with industry (to correct factual errors in the press and to describe history and settlements of litigation)
- using industry's experts (and thus their professional credentials) to testify to key points at hearing through the use of legal cross-examination of industry witnesses at hearings
- hiring or inviting technical experts to testify on our behalf
- by requesting their help, we allowed government agency experts in land reclamation techniques to present technical expert testimony at state hearings to set strip mine reclamation regulations
- working with a company's technical, economic, and administrative officers to tell the whole story publicly and to congressional leaders

(including the facts a company typically does not include in press releases)

Exporting Expertise

We also exported the expertise we developed in air pollution issues to other states and to federal proceedings. As a result, we have greatly improved the quality of presentations on air quality issues. In the past, industry experts exhibited a certain arrogance, frequently assuming that their values were representative of the public at large. Visibility which was "good enough" for a polluted city which fell within the minimum required to land a plane in was "good enough" for a National Park. In one instance, an engineer calculated the mercury released into a stream and compared the resulting concentrations with water quality standards, completely unaware of the effect of biological magnification which could take the concentrations he calculated and produce toxins in fish which would render them unfit for human consumption.

Another noted expert calculated both the maximum 24-hour average concentration of sulfur dioxide from a generating facility and the maximum 3-hour concentration. When we pointed out that his calculations represented a ratio of 15:1 between the two concentrations, he could only say that he found it "interesting." If all the concentrations occurred during a 3-hour period the ratio would be 8:1, and higher ratios would be impossible.

We do not cite these cases as evidence that some industry experts are stupid or incompetent, but rather to illustrate the importance of adding another perspective to the debate. It also shows the pitfalls of listening only to like-minded peers; comfortable assumptions often become untenable when confronted with sound, well reasoned challenges.

When the 1990 Clean Air Act Amendments placed new restrictions on sulfur emissions from coal-fired power plants, most power plants in the Southwest were already controlling their emissions at stricter levels than those specified in the law. Two major facilities, the Navajo Generating Station (NGS) in northern Arizona and the Mohave Generating Station in Nevada are currently uncontrolled. The operators of the NGS have agreed to reduce its emissions to protect visibility, and at the Mohave plant further studies are still underway.

Of the many hearings we have participated in, one in particular can be pointed to as an excellent example of how cross examination can be used effectively to educate the public. The hearing was held in Silver City, a small community near a major smelter in the southwestern corner of New Mexico. After one member of our group presented testimony on the economics of controlling emissions from copper smelters, a lady from the audience rose to cross examine. There was a hard edge to her voice when she asked why we had come down from the northern part of the state to interfere in the business of a local industry. Our witness responded, "The people representing the industry are from New York City, Washington D.C., and Los Angeles and they have every right to be here. I have knowledge of the feasibility of pollution controls and I have been asked to help people from this community. I spend my vacation time and pay my own travel expenses to help people interested in clean air. I hope you will afford me the same rights as those enjoyed by the industry representatives." The lady's demeanor changed as she said, "I see. Thank you and I hope you enjoy your stay in our city."

Significant battles were fought over sulfur emissions from smelters. We also fought to obtain more stringent ambient standards which specify the dividing line between legally polluted air and air that is considered clean. It was interesting to hear the industries argue at a hearing on ambient standards that a stringent standard would shut down the state. Later, at a hearing on emission regulations, the same industries argued that very large emissions could be permitted without producing violations of ambient standards. This kind of inconsistency was something we were often able to use to our advantage.

We have not always been successful. At one hearing on ambient standards, the New Mexico Environmental Improvement Board voted 4-0 to impose a stricter standard. However, the victory was short-lived because the secretary of the Board chose not to sign the regulation implementing the ruling. The copper industry brought pressure to bear on the governor and the Board, which reconsidered the regulation and rejected the stricter standard by a 3-2 vote.

Conclusion

What have we learned from all this? We proved that nongovernmental organizations can play a very important role by providing an important perspective which would otherwise be lacking. Their presence at public hearings and at the bargaining table can produce a more thoughtful and valuable discussion. When they can couple public support with scientific expertise, they can help shape major policy initiatives, free government regulatory agencies to act in accord with their own best judgement, and help place raw data and intimidating scientific terminology in a meaningful context. They can help industries who sincerely want to protect the environment. Without the influence of nongovernmental organizations, those who pollute will have a competitive advantage over those trying to do the right thing. In addition, information developed by nongovernmental organizations can be used by environmentally responsible companies to defend their cleanup actions in the face of stockholder opposition.

By helping to ensure that environmental policy is established with input from diverse voices representing a broad spectrum of viewpoints, nongovernmental organizations help balance the load on the scales of justice.

Teaching Strategy

Black Mesa: A Senate Committee Hearing Simulation

Social Science Education Consortium

Objectives

1. To stimulate students to weigh the benefits of energy exploration against its impact on Indian culture and land use and the environment.
2. To develop understanding of the function of a Senate factfinding committee hearing.
3. To increase awareness of the decisionmaking process.
4. To explore many sides of a complex issue.
5. To enhance critical thinking, argumentation, and decisionmaking skills.

Background

Ever since the colonization of the New World, traditional Indian culture and land use have been on a collision course with white culture, laws, and know-how. When coal was discovered at Black Mesa, Arizona, home of Hopi and Navajo, power companies signed contracts with the tribes to strip-mine the land. Coal-fired power plants were built. The impact on the Indian culture, land, economy, and environment has been controversial ever since.

In the early 1970s, a lawsuit was filed against the Department of the Interior, charging that it had not lived up to its role as trustee to protect the tribes against the alleged abuses of the power companies. Another suit, filed by a group called the Black Mesa Defense, tried to change the original contract with the Peabody Coal Company to raise the price per ton of coal paid to the Indians.

These controversies led to Senate subcommittee hearings on whether a moratorium should be placed on the construction of more coal-fired power plans in the Southwest. Much of the information included in this activity, which is a simulation of a Senate "fact-finding" hearing, came from the actual Senate hearings. Through this simulation, students see a full spectrum of views and gain an appreciation of the complexity of the issues. The format of this activity can also be used when studying other contemporary environmental problems.

Grade Level

This activity is suitable for students in grade 11 and above.

Materials

Distribute copies of the Student Handout to all students; also provide students with a copy of the description of the individual roles they will play. A sign for each role is also helpful (students can make these during the preparation period).

Time Required

Allow one and one-half to two class periods for this activity.

Procedure

1. Distribute the Student Handout. Have students read it to themselves, then invite them to raise any questions they may have concerning it.
2. List all the roles on the board. Briefly discuss the roles and make role assignments. Those students not assigned witness roles should be designated to serve as members of the Senate committee. Hand out role cards.
3. Allow time for students to prepare testimony. Be sure the Senate committee chairperson understands his/her role. Instruct the chairperson to call witnesses in the following suggested order: Peabody Coal Company spokesperson, Black Mesa Pipeline Company spokesperson, utilities representative, BIA representative, U.S. Geological Survey representative, U.S. Park Service representative, Navajo traditionalists, Hopi traditionalists, Navajo progressives, Hopi progressives, Chairman of Navajo Tribal Council, Chairman of Hopi Tribal Council, hydrologist, air pollution expert, reclamation expert. *Note:* The attitudes and points of view expressed in the various roles in the simulation reflect views held in the early 1970s but do not necessarily reflect attitudes of contemporary counterparts.
4. Set up the room with the committee facing the audience. Place a chair next to the committee for the witness.
5. Conduct the hearing.
6. Allow time for the committee to deliberate. Have the committee announce its decision and explain its reasoning. Make sure all the issues listed in the committee role description have been discussed.

Student Handout

The Black Mesa Debate

Black Mesa, located in northern Arizona, is barren land with little water, covered with brush and juniper and pinon trees. It is in "big sky" country with breathtaking vistas. To the Navajo and Hopi Indians, this 3,300-square-mile plateau is home, a sacred center, a burial ground. The Navajo call it the Female Mountain. Nearby is Lukachukai, the Male Mountain. Together they are symbols of the balance of nature which is the Navajo's duty to preserve.

To the Hopi, Black Mesa is very sacred land. The Hopi are an old people, having lived on their sacred mesas for more than 700 years. They came into this land when the Great Spirit allowed them entrance, instructing them to keep the land in trust until he returned to claim it. Thus, the Four Corners region—a region famous as the intersection of the borders of Utah, Colorado, Arizona, and New Mexico—is the Hopi center of the universe. They are charged with its care by the Great Spirit. The Hopi prophecy, so correct in many of its predictions, unsettles many observers who see the beginning of the destruction of this region. For it is said that in the third war in which the fate of mankind is finally settled, only Four Corners will be a sanctuary. It is to this place that all good people will come when the day arrives for the great purification. If this land is also destroyed, then there is no hope for humankind, and, in time, all life will vanish.

To many environmentalists, the prophecy is more than coincidental. With scientific understanding of what is going out of balance in nature's delicate web of life, dire predictions plague them as well.

Not everyone on the Hopi and Navajo reservations share this point of view. Many "progressives" feel that day-to-day poverty is a more immediate concern. Sixty to seventy percent unemployment rates must be dealt with. A sense of hopelessness, which often ends in alcoholism, can be fought with meaningful employment, money to buy the necessities, schools and opportunities for the young, and a secure knowledge that there is a tomorrow to look forward to.

These opposing positions collided when coal was found on Black Mesa (as well as in other areas), and an opportunity for economic growth was presented. Power plants were planned and built in the Southwest. One plant's technology was so primitive that it would not be allowed in states such as California because of the air pollution it caused. In the late 1960s, this plant—the Four Corners Power Plant—was considered to be one of the worst polluters in the United States. Later, other coal-fired power plants were built. One, the Navajo Power Plant, is located on Lake Powell near Page, Arizona, and the other, the Mohave Power Plant, lies about 275 miles to the southwest. Both plants use Black Mesa coal, which is slurried through an underground pipeline after being ground up face-powder fine, mixed with water, and pumped to the plants. Each of the power plants pollutes the air in the area encompassing many of the monuments, parks, and recreation areas found in the Southwest.

Overriding all of these concerns has been the growing need for more and more electricity. It is needed for the lights of the Las Vegas strip as well as for all the TVs, radios, dishwashers, refrigerators, stereos, washers, dryers, and air conditioners of Los Angeles—for that is where the energy from Black Mesa is going. For the Southwest it means more coal, more water, more air pollution. It also means more jobs, more security, better schools, a hopeful future for many Indians. Up until the late 1970s, the demand for electricity was doubling every ten years. That demand is now going down. Even so, the West still gets the energy, and the Southwest the pollution.

For the Indians the impact of the coal industry has been both positive and negative. A host of economic, legal, and cultural issues need to be examined. The historic conflict of Indian culture and land use with white culture, laws, and know-how continues in the struggle over Black Mesa.

Roles

Senate Fact-Finding Committee (7 or more roles)

Select one member of the committee to act as chairperson. He/she will be responsible for calling and dismissing witnesses and asking for questions from the other senators.

The purpose of this hearing is to determine if further investigation is necessary to determine whether the strip-mining of Black Mesa should continue. You will hear testimony representing a variety of viewpoints. You will ask questions of each witness after his/her testimony.

In making your decision, you will address the following issues:

1. Is strip-mining helping or hindering the Navajos and Hopis?
2. Are the coal companies living up to the agreements in the contracts?
3. Will the water depletion (usage) that is caused by the slurrying process cause serious future problems in the area? Should the government take some action to prevent this?
4. Are there sufficient air pollution controls on the power plants, or should the government take some action?
5. Is the water pollution serious enough

to require government action?

6. Was there sufficient support from the Navajo and Hopi people to make the contracts in the first place?
7. Is the presence of coal companies destroying traditional cultures and ways of life?
8. Did the Bureau of Indian Affairs give adequate advice to the Indians before they signed the contracts? Are the government agencies adequately protecting the interests of the Indians?

Your answers to these questions should help you determine whether further investigation is needed.

You should take notes as each witness testifies, listening carefully for information that conflicts with testimony from other sources. Ask questions to clarify issues.

As a committee, you will decide that either (1) further investigation is necessary, or (2) what is being done at Black Mesa is generally good for the Indians, the power companies, and the nation. Further investigation could lead to legislation to correct the situation if you determine that changes are needed.

Hopi Traditionalists (1-2 roles)
You believe that your people are the "keepers of the earth." Your Hopi prophecy warns about the destruction of the Four Corners region, where the white man has drawn the corners of four states. This, you believe, is the center of the earth. Your prophecy says that when the sacred center is destroyed, the end of the earth will follow.

The strip-mining is destroying the earth and is taking your precious water. You see evidence that your springs, wells, and groundwater supplies are drying up and will not be adequate to grow your traditional crops of corn and beans. They are the basis for your Hopi way of life, and are at the center of religious ceremonies celebrated for a thousand years.

You are worried that the air pollution is destroying your skies. Runoff from spoil banks at the mine (which are made up of the soil that lies above the coal, called the overburden, stripped away during the mining process) flow into the washes that end up in your fields. If the runoff carries dangerous sulfur concentrates from the mine, your fields will be ruined.

You never agreed to the lease with the Peabody Coal Company. The BIA forced the Hopi to hold elections for a tribal council. They did this in order to establish a government that would sign contracts with the coal companies. Only 651 Hopis out of 4,000 took part in the elections. You don't believe in this form of government because it goes against your traditional ways of government and law. Nevertheless, the BIA recognized the vote as valid and had the tribal council sign the contract with Peabody, a contract that represented the will of less than one-third of the Hopi people. It has yet to be read or explained fully to Hopi traditionalists.

Chairman of the Navajo Tribal Council
Your position (and these are the words of the actual chairman) is this: "Strip-mining doesn't really bother me because, first of all, any resource that is on the reservation under the ground is for the Navajo to utilize." What bothers you is that the tribe does not own the power plants. If the tribe owned the plants, it would help build a permanent economic base on the reservation. The tribe would then sell the power and receive all the economic benefits rather than the one-tenth that the Navajos now receive from the sale of energy or power. What also bothers you is that Peabody pays the tribe only 25¢ per ton of coal. The cost of coal has gone up a lot since the contract was signed. The tribe got very bad advice from the BIA before signing the contract, which made no provision for inflation. As a result, the tribe is now locked into a very low rate for its coal.

U.S. Geological Survey, Water Resources Division Representative
Your preliminary calculations of the long-term effects of the Peabody Coal Company's depletion of groundwater supplies in the Black Mesa area are discouraging. Your findings indicate that the water table will drop about 100 feet at Kayenta (northwest of the mesa) over a 30-year period, with lesser water level declines occurring at several other areas close to Black Mesa.

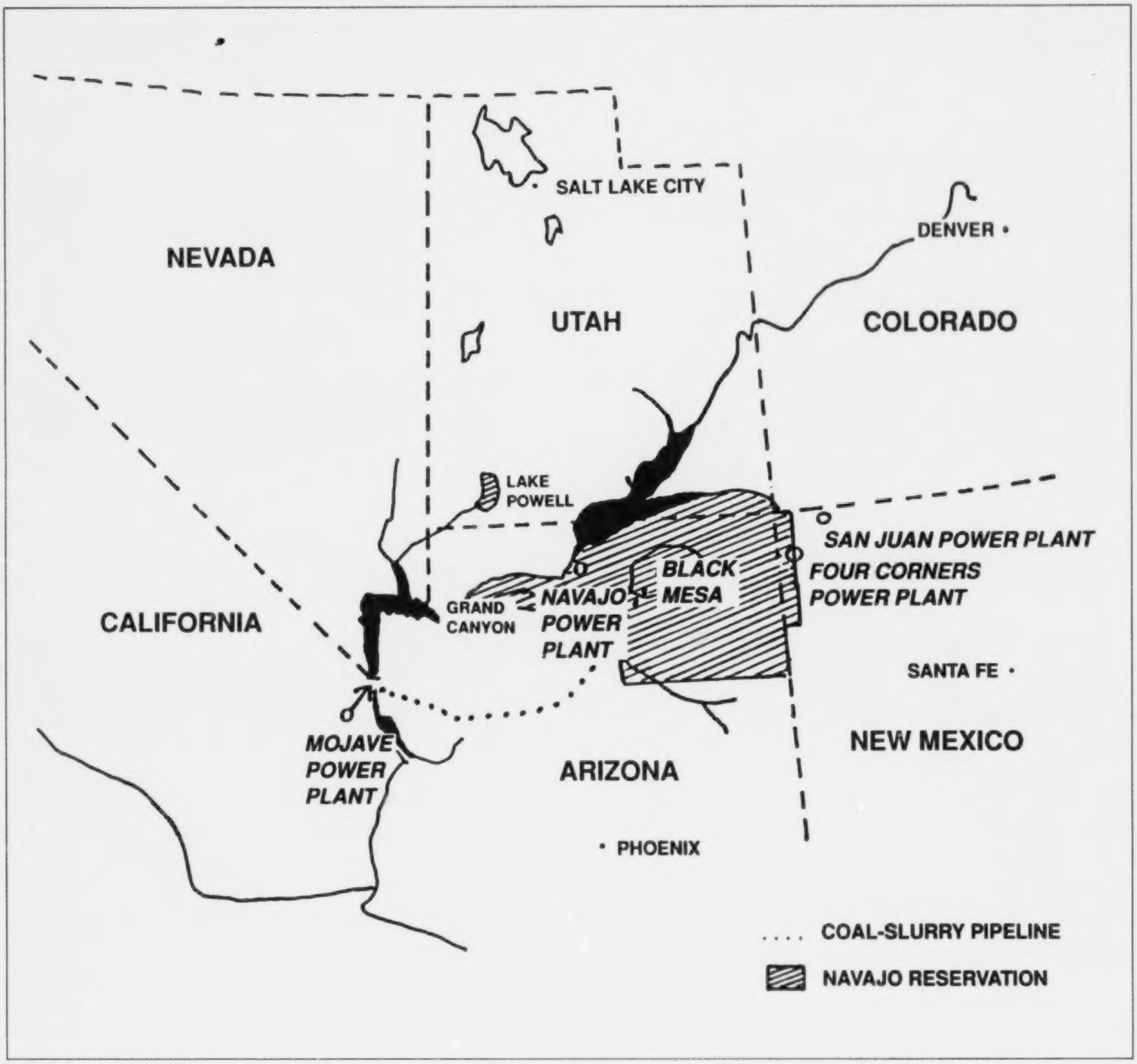
U.S. Park Service Representative
You are a Park Ranger at Navajo National Monument just across the highway from Black Mesa. You have noticed that the seasonal flows of the streams fed by underground sources have stopped running. Air quality has declined since the Navajo and Four Corners Power Plants have been operating. In the Southwest, the "Enchanted Wilderness of the Colorado Plateau," there are six national parks, 28 national monuments, two national recreation areas, scores of national historic landmarks and state parks, and 39 Indian reservations that can be adversely affected by air and water pollution from the stripping and burning of coal.

Navajo Traditionalists (1-2 roles)
Traditionalists want to preserve the old ways. You believe that Black Mesa is sacred land, that the earth is your Mother and the sky is your Father. It is a holy place where many "ancient ones" are buried. It bothers you to see the earth ripped up by the strip-mining and the air polluted by the burning of coal.

Seventy-five families have had to be relocated far from their Black Mesa homes as the strip-mining has moved across the mesa. The mining is intruding on other Navajos' allotted lands. The company builds white houses for you instead of your warm hogans. On the mesa they have cut many new roads and have bulldozed away many of the junipers and pinon forests. Company coal trucks rumbling by at all hours destroy the quiet and privacy you used to enjoy.

You have heard that Peabody has dug very deep wells. They are draining off the underground water that used to feed the springs. You worry about your drinking water and water for your sheep. Springs are drying up and grazing lands are being fenced off. You have no access to them even after the company has reclaimed the land. They tell you to keep your sheep off until they tell you otherwise.

They have changed the way the mesa looks. They have changed your way of


NEVADA
SALT LAKE CITY
UTAH
DENVER
COLORADO
LAKE POWELL
SAN JUAN POWER PLANT
BLACK MESA
FOUR CORNERS POWER PLANT
GRAND CANYON
NAVAJO POWER PLANT
CALIFORNIA
SANTA FE
MOJAVE POWER PLANT
ARIZONA
NEW MEXICO
PHOENIX
. . . . COAL-SLURRY PIPELINE
▨ NAVAJO RESERVATION

life. You feel your way of life is threatened.

Air Pollution Expert

The Black Mesa coal is low in sulphur, but it still burns very dirty. This would not be a problem if the power plants used the latest in air pollution control technology. If the plants' operators are as reluctant as the Four Corners plant to install adequate scrubbers and electrostatic precipitators (which remove sulphur and particles of fly ash from the gases that escape into the atmosphere), there will be trouble. It has taken 11 years of hearings and lawsuits to force clean-up of Four Corners. Air pollution from coal-fired power plants causes health problems—respiratory diseases and injury to plants and animals. The contracts with the Indians have all stipulated the use of the latest pollution control technology. Since the Departments of Interior and Health and Welfare are charged with protection of the Indians, the government should make the energy companies live up to the promises of their contracts.

Reclamation Expert

One cannot expect the same results from reclamation here as in the East. With less than 12 inches of rainfall a year, very different methods have to be used. The topsoil and overburden must first be removed and saved. After the coal is mined, the overburden and topsoil must be carefully put back. Peabody did not do this until forced to by the National Strip Mine Law passed in 1977. Unfortunately, this law doesn't cover what was "reclaimed" before 1977.

Peabody Coal Company Spokesperson

In 1964, your company signed 66 leases covering 35,000 acres of the mesa, with another 40,000 acres in the area jointly claimed by the Hopi and Navajo Reservations. This land is known to contain 337 million tons of coal lying in seams up to 8 feet thick near the surface. You pay the Indians 25¢ per ton of coal. Including royalties, you will pay the Navajo tribe $14.5 million over the course of the leases, with an additional $58.5 million to be given to individual lessees. You will reclaim the land, and will have to fence the land to keep Navajo sheep off the fragile new vegetation you will plant.

Bureau of Indian Affairs Representative
You negotiated the contracts for the Indians, firmly believing that it was in the best interest of the tribes. They have the coal but no technical expertise; the industries have the technology but no coal. This seems to be a perfect fit.

Hopi Progressives (1-2 roles)
The "traditionalists" argue that the contract with Peabody was approved by less than one-third of the voters. It is their fault if they chose not to participate in the election. The contract won a majority of the votes cast.

Your people cannot depend on farming as the only economic means of survival. You have a small population, only 5,000. Your reservation lies within the much larger Navajo reservation, which has 130,000 people and is still growing. They are pressing in on you, simply taking your land when they need it. Your people have had little help from the federal government in stopping this. You believe you must stop it yourselves by growing as a people, but you can only grow if you can feed a growing population. Jobs will bring in the money to encourage people to have larger families. Farming cannot do that. It is marginal now because of scarce water.

Mining on Black Mesa has scarred the land, but Peabody must live up to the contract, which guarantees that the land will be returned "in as good condition as received, except for the ordinary wear, tear, and depletion incident to mining operation." They have agreed to reseed the "areas where strip-mining activities have been completed and to bear the full expense of such a reseeding program." You must trust them because you need the jobs desperately.

Hydrologist
You are an expert in the study of water. Peabody has sunk wells to a deep aquifer, some 2,000 feet below the surface. They have lined the wells with casing to avoid draining the higher reserves of water. You believe there has been and will continue to be seepage, cracking and shifting of strata, making it more than likely that the Indians' water will be depleted. In an area where water is very scarce, this could destroy their ability to exist. The threat of acid drainage into water supplies is very real. Also, seepage into the washes that feed into Indian fields can bring sulphur, salts, and weathered or disintegrated shale flooding into the fields, destroying their potential for farming.

Black Mesa Pipeline Spokesperson
Your company buys the coal from Black Mesa Mine #2, grinds it up into a fine powder, mixes it with water and slurry, and pumps it 273.6 miles to Bullhead City. There it is separated from the water and burned in the Mojave Power Plant. You use from 2,000 to 4,500 gallons of water per minute, drawn from wells some 2,000 feet deep.

Chairman of the Hopi Tribal Council
You have nothing but praise for the power companies and the mines. They are providing much needed employment for your people, who have heretofore had to rely on farming as a way of life. You claim that the traditionalists are troublemakers with no support in the tribe itself.

Navajo Progressives (1-2 roles)
Progressives want to abandon the old ways to help raise the Navajo standard of living. New ways mean progress through economic development. You support the 1957 lease with Utah Mining that provides coal for the Four Corners plant; the 1960 lease of land for the Four Corners Power Plant; the 1964 lease to Peabody on Black Mesa; and the 1966 joint lease with the Hopi to Peabody for more Black Mesa acreage. All of this translates into "new jobs, large tax benefits,...royalties."

Royalty payments average around 25¢ per ton, giving the tribe some $58.5 million over the life of the lease. In addition the Navajo tribe will receive $5 an acre-foot from some 110,000 acre-feet of water; this means another $550,000.

Peabody has guaranteed that 75 percent of the miners hired are Navajo, creating 375 jobs. They pay prevailing wages, which average more than $15,000 a year. Until the energy industry moved into the area, the only jobs had been in sheep grazing. The land has been overgrazed and can support fewer sheep than it has in the past. The population of the tribe is growing rapidly, but its standard of living is far below that of the rest of the country. In 1970, the mean annual income was less than $700. More than one-fifth of the population was not able to get jobs, and those who did were forced to leave the reservation, their homes, their family, and their friends. Now, with the mine on Black Mesa, there is work.

Utilities Representative
The utilities have to use the coal where it is found. The Navajo and Hopi have a great deal of coal on their land. You buy the coal from Peabody or from Utah Mining, who lease the land from the Indians. You burn the coal in power plants to generate electricity. The United States is an energy-greedy nation whose greatness depends on the ability to provide electricity. The Indians become wealthy from their coal, but they are also helping the rest of the nation. The Four Corners Power Plant, located near Farmington, New Mexico, generates more than 2,000 megawatts of electricity, enough to meet the needs of some 2 million people. The Navajo Power Plant at Page, Arizona, which gets its coal from Black Mesa Mine #1, generates 2,300 megawatts and the Mojave Power Plant near Bullhead City, some 1,500 megawatts.

This activity is adapted with permission from the book "Law in U.S. History, A Teacher's Resource Manual," Melinda Smith, editor, Kenneth Rodriguez and Mary Louise Williams, contributors, for the New Mexico Law-Related Education Project, published by the Social Science Education Consortium.

The Right to Sustainability

The Story of the Southern Sea Otter

Margaret W. Owings

It will require new ways of harnessing science and technology, as well as new kinds of sound and humane policy studies—if we are to generate the political will to implement the conclusions of such studies. We may well require a kind of spiritual revolution, a conversion to the ideal of living in harmony with nature on the surface of this hospitable planet.

Dr. Murray Gellman,
Winner, Nobel Prize in Physics

I speak of the sea otter itself, this intimate marine mammal which offers the human race a personal reunion with life in the sea. Our instinct shares a close association with these creatures, our observations tell us what they do, and our scientific studies tell us how and why they do it.

From my cliffside seat above the sea, I am often swept up by the roar of explosive power, the mounting cadence of sea lions, the drumming of elephant seals and the wild cry of circling gulls. But at this moment, when the coastal waters lie calm, one senses a broad current of sound, until my ears are pricked by the quick tap-tapping of a sea otter. Resting in a kelp bed of glassy fronds which encircle its small body, it cracks a clutch of mussels against a stone tool lying on its chest. A fragment of wind, flung up from the ocean, brings this meaningful sound to my ear. I say "meaningful" because it has signalled for millions of years the presence of this smallest of sea mammals along the California coast

Far back to the Pliocene Age when the shifting landforms were not firmly positioned, the area that is now called Monterey County was essentially an island where its eastern shoreline held heaps of fossilized bones and where a sea otter skull lay close beside mollusks imprinted in the sandstone.

Thus, for eons of time, a population balance between otters and their shellfish prey was maintained in a fluctuating, natural equilibrium until the fur trade commenced in 1741, and continued for 170 years until every sea otter was believed to have been ruthlessly slaughtered. But the sea otter with its relentless drive for life, valiantly returned, despite the greed and cruelty of the fur traders. However, only remnants of the species were left along the entire Pacific coast.

Yes, the sea otter is a resource, just as the coastal waters, deep submarine canyons and tidal shelves, habitat to diverse ecosystems, are vital resources to be guarded. Preserving these resources is an issue in which we all have an important stake.

Is it a sense of empathy we have with this little animal as it plays and splashes and, with a flip, somersaults beneath the surface only to return and peer at us again? Those expressive forepaws twist blades of kelp as anchor cords for stability in the rise and fall of the tides, while a mother otter embraces her pup riding on her chest or belly as she licks, grooms and nurses it. The only tool-using sea mammal in our waters, the otter carefully selects a stone of the proper size, tucks it into a loose pouch at the axilla of its forepaws, and brings it out for use in hammering mollusks until they are broken and edible.

Unlike the pinnipeds (the seals and sea lions, etc.), the otter has no subcutaneous fat for body warmth and therefore demands a high food intake (20% to 25% of its body weight per day), to satisfy a metabolic rate sufficient to maintain its body temperature. The otter's fur consists of a sparse outer layer of guard hairs and an extremely dense wooly underfur (600,000 hairs per square inch) filled with air bubbles. The warmth and beauty of this luxuriant fur accounts, alas, for the value placed upon it for use as human wearing apparel.

The Fur Trade Begins

A frantic rush for sea otter pelts commenced in 1741 in the northern Pacific when a Danish explorer, Vitus Bering, and a German naturalist, George Stellar, in the service of the Russians, sailed north from the Kamchatka Peninsula to determine

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Margaret Owings is Founder and President Emerita of Friends of the Sea Otter and has received innumerable awards and honors in recognition of her many years dedicated to the preservation of wildlife.

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whether the continents of Asia and North America were joined. Although Bering's ship was wrecked in rough seas and washed up on an island (later called Bering Island) and Bering lost his life, the voyage was considered to be a triumphant event when the crew finally returned to Petropavlosk with 900 sea otter skin, which sold for some $30,000.

From 1743 to 1799, Russian ships, accompanied by enslaved native Aleuts, were said to have taken 186,754 sea otter pelts. We have no knowledge of the original population of sea otters, but only find records of skins delivered to the Russian Court and the Emperors of China, along with a broad Chinese market. One account estimates that nearly a million skins were taken in less than 175 years—a shocking, cruel ending for these beautiful, docile animals and their precious pups.

Alexander Baranov, an influential Russian fur trader, held sway over these northern seas until the otters had been virtually wiped out. Records indicate that he traded 200,000 pelts worth approximately $50 million. Later, Baranov joined the Yankee clipper ships to establish the Russian American Trading Co., which moved down the coast of California to harvest every otter in the kelp beds and along the rocky shores. It was he who set in motion a plan to establish a Russian foothold in California when he purchased land from the Pomo Indians 80 miles north of San Francisco to start a settlement (which became Fort Ross) but, after 1,200 otter skins had been collected and the supply apparently exhausted, he sold the property to John Sutter. In 1867, when the Russians sold Alaska to the United States for $7,200,000, it was largely because all the sea otters appeared to be gone and there was apparently nothing left of value.

Farther south, although many otters frequented the shores of lower California, no trade was seen there until 1783, when the vessel *Princessa*, flying the Spanish flag, left Acapulco carrying 1,700 to 1,800 sea otter pelts. The Spanish padres, building their missions along the coast, put Indians to work clubbing the otters with long sticks. Before long, the Spaniards had company in the otter trade, as ship after ship smuggled into small ports luxuries such as China silks, mother of pearl, and lacquer, which they traded with the padres and rancheros for otter skins.

In 1941, Adele Ogden researched the California sea otter trade, and listed 181 voyages of identified ships, of which only 68 (fewer than half) logged the number of skins taken. She counted 55,642 taken between 1786 and 1847. Add to this number the skins from unidentified vessels working in secrecy, cargos of skins lost in ship disasters, Indian otter hunts, and one can estimate that more than 200,000 sea otters were killed along the California coast during those 61 years.

Among the last of the fur traders

were Eliab Grimes, who commanded the *Eagle*, and John Roger Cooper, captain of the *Rover*. Their ship's logs recorded their last trips south, with each voyage between San Francisco and Santa Barbara bringing fewer and fewer otters. On their final voyage, after sparring for the last dozen or so otters, they returned home, empty handed. Later, Grimes and Cooper were given large land grants along the Big Sur coast from the Spanish Crown. (*Author's note:* For the past 36 years, I have lived on the point of land below the pioneer cabin where Eliab Grimes first settled, and have spent the last 25 of them working to ease some of the misery this man inflicted on the otters so long ago.)

In 1911, Japan, Russia, England, and the United States signed a treaty in which they agreed to stop killing the sea otters—from the waters of Russia and Alaska to the north to the coastal waters of California on the south. By then, it was feared that the sea otter was already extinct, but, in fact, a few isolated groups of animals survived in the Aleutians, with a tiny and now celebrated group hidden along the coast of California.

Two years later, in 1913, Amchitka Island in Alaska was designated a National Wildlife Refuge, and, three years later, when otters were once again sighted along its shores, it was made a sea otter refuge. But, despite the island's special status, the Atomic Energy Commission used it as a nuclear test site; a weapons test there roughly two decades ago killed at least 1,000 otters.

Renewed Threats: The "Dancing-Blankets" and Poachers

It is a sad paradox that today, with the remarkable comeback of the Alaskan otter, it is once again at risk, threatened by a federal court's determination of what is called "native take." This is defined as the right of Alaskan natives to kill otters for personal subsistence and to sell authentic native handicrafts, including items such as

Friends of the Sea Otter: The Beginnings

In 1968, the Natural Resources Committee of the California Senate scheduled a meeting in San Luis Obispo to discuss issues concerning with the sea otter. Seeing that the crowd would largely consist of local fishermen, State Senator Fred Farr phoned to ask me, "Don't you want to come?" After moment's hesitation it seemed logical that I should attend. As it developed, the meeting grew wild and raucus, with the abalone men shouting at once, standing on their chairs, and waving their arms. But the noise and tumult served to open a door for me, inspiring a quiet determination that led to 25 years of concentrated work as an advocate for the California sea otter.

During the meeting, I noted only two men who spoke out in defense of the otter. I moved over and sat next to the McMillan brothers, cattle ranchers in San Luis Obispo County. Ian McMillan made a statement which I scribbled in my notebook. It read, "This remnant population of sea otters now surviving along the Calif. coast, even though but a remnant, should represent one of our greatest conservation challenges and achievements!" Their lone voices indicated that the sea otter needed a friend.

I returned home and wrote a letter to the *Monterey Herald*, which they printed under the heading: "Does the Sea Otter Have Any Friends?" A few days later, I met with Dr. James Mattison, Jr., a surgeon who had taken superb underwater photographs of the sea otters, published in the *National Geographic* for an article written by Dr. Karl Kenyon, an authority on Alaskan sea otters. Dr. Mattison and I set up a trust to form Friends of the Sea Otter "to stand closely behind a sound conservation program for the southern sea otter." In no time, we had a membership of 500, which soon grew to 1,000, and we added the promotion of scientific studies and an educational program to our stated goals. One lawyer and underwater photographer took me aside and said, "Let's let the otter sell himself. If we can just show him to the public, this little guy will make friends in any controversy. You don't find yourself wanting to embrace an abalone, do you?"

In the ensuing years, we faced a number of challenges—the introduction of a measure in the California Senate that would have permitted sea otters to be killed outside their refuge; oil drilling along the coast; oil tankers plying their routes too close to shore; the use of gill and trammel nets that drown otters; and hostility from the state Department of Fish and Game. One significant victory was convincing the federal government to include the southern sea otter on the endangered species list, as a "threatened species."

Today, our membership numbers nearly 5,000 worldwide. Our educational efforts have grown as well; with the help of a volunteer educational coordinator, children in grades three through six up and down the Monterey Peninsula learn about this fascinating little sea creature and its place in the fragile coastal ecosystem.

For more information about Friends of the Sea Otter, contact: Friends of the Sea Otter, 140 Franklin Street, Suite 309, Monterey, CA 93940; or phone (408) 373-2747.

teddy bears and luxury pillows, for the tourist trade. Although Friends of the Sea Otter (FSO) was disturbed by the court's action, we realized that the natives living along the Alaska coast should be permitted a "guarded take" of otters for this purpose.

But the court's decision, followed by the legislature, failed to include any limitations, set any boundaries, or ban commercial exploitation of the otters. As a result, this action may well result in a revival of trade in otter pelts not unlike that of the Baranov era of a century ago.

And the Alaskan natives, the only people allowed to hunt otters under federal law, have been slaughtering growing numbers in southeast Alaska. With the help of relatives from Washington State, they are trying to develop worldwide markets for what they call "dancing-blankets" as well as otter sex organs which are used in some cultures as aphrodisiacs. One Tlinget Indian engaged in commercial fishing from Ketchikan said he and his brother "have spent $150,000 on phone calls and travel to Asia and Europe to market otter products." Their company, Kuiu Kwan, Inc., based in Lynnwood, Washington, markets otter products to Japan, Korea and China, but could soon expand to worldwide distribution. The "dancing-blankets," which consist of two otter pelts sewn together with thongs (thus qualifying as "a native craft"), are easily pulled apart, allowing the pelts to find their way to the lucrative fashion market. So once again, greed, this time clothed in noble motives, has put the sea otter at risk.

Friends of the Sea Otter appealed the decision to allow native take in Alaska, but was unsuccessful. Groups in Alaska turned to FSO as the only full-time sea otter advocacy group in existence and reminded us that we have an established history in Alaska that needs to be felt again. Our goal is to help the natives develop a self-management program to curb the excesses of the few. We also seek legislation that would head off another frantic rush for fur, citing the need for clear definition of "subsistence take" and "depleted stocks." The provision of adequate funds for enforcement is another legislative priority.

Meanwhile, to the west, across the Bering Sea, the otters have returned to the Kuril Islands and the eastern Kamchatka coasts, with their number estimated in 1980 at between 15,000 to 17,000. One consequence of the breakup of the former Soviet Union and the economic crisis that followed has been a resumption of illegal hunting of sea otters. Poaching of sea otters by both Russians and Japanese has been on the rise since the fall of 1992. The otters are particularly vulnerable from November through May, when they climb on the shoreline to escape the strong storms at sea, allowing poachers to simply hit them on the head with a stick. The main trade for otter pelts is centered on Petropavlovsk Kamchatsky, with buyers coming from as far away as Moscow and St. Petersburg. The situation has become very serious.

Otters and Abalones

After the sea otters returned in 1938, when over a hundred were seen rafting in the waters off Bixby Creek in the center of Big Sur along the California coast, it was a glorious moment of rejoicing for the scientists, who proclaimed the otter back from extinction.

Barely surviving 170 years of fur trader's greed, the otters emerged into public view and commenced sculling their way north and south into the areas they once called home. On this rich shoreline, large abalones clutch rocky tidal shelves, mussels cling to barricades of stone, and urchins, red and purple, carve circular niches in the sandstone. Macrocystis, the kelp playground of the otters, has a rootlike structure called "holdfasts," which are inhabited by some 100 small species of sea creatures. This diversity of life contributes to a balanced ecosystem.

One group which did not share in the jubilation over the return of the otters was the abalone fishermen. With more than 200 registered boats—each using divers to harvest approximately 500 pounds of large red abalone a day—the fishermen viewed this playful creature as a very real threat to their commercial enterprises. The abalone fishermen saw little to smile about as the otters took pleasure in the difficult effort of diving four or five times with a stone in their grasp, breaking a hole in the shell of an abalone to loosen its suction before retrieving it for a meal.

Imagine a fishing boat coming into Morro Bay heaped with a profitable haul of abalone passing a small sea otter floating on its back with an abalone and a stone on its tummy. It was eating this gourmet sea snail! Out came the fisherman's rifle, and, as one of the divers complained, "I wanna tell you, it's mighty hard to shoot an otter from a rocking boat!" Soon, otter corpses began to wash ashore, carrying bullet wounds or knifing scars. Throughout the 1950s and 60s the otter census markedly diminished.

For years, abalone fishing was conducted on a massive scale in the coastal waters; it was not uncommon to find abalone shells piled 20 feet high along the roads and backwashes of the coast. By 1929, in Monterey Bay alone, 3.4 million pounds were harvested, dried and packaged for shipment to China. Divers became increasingly more efficient in stripping the tidal shelves bare; in the years following the end of World War II, they employed modern diving gear as they moved down to Morro Bay. Here a growing group of Portuguese and Italian boatmen and divers were developing abalone fishing into a powerful industry.

In 1957, fishermen brought in 5 million pounds and in 1966, this grand harvest was repeated. The following year, when divers returned to depleted abalone beds, the sea otter, quite predictably, was cited as the culprit. For a time, the California Department of Fish and Game guarded and watched over the otters. Later, with a change of administrations, the tenor of the department changed, and it concentrated primarily on the commercial and sport use of the abalone resource.

A Useful Scapegoat—Again

Friends of the Sea Otter noted that the otters were again used as a scapegoat for man's indiscretions, when in 1973 a new crisis was brewing. It began when a few otters were seen approaching Pismo Beach south of San Luis Obispo. Even before a single otter arrived, a city councilman referred to them as "an infestation" and asked the federal government "to trap them before they reached the great stretches of sand at Pismo."

By February 8, 22 otters had arrived, increasing to 83 in May, but dropping to 51 by June as they returned north in what was referred to as "a seasonal fluctuation." Despite the apprehension voiced by the local clammers, the otters had little impact; in a single holiday weekend that year, for example, the clammers catch weighed in at 45,000 tons.

A scene from decades earlier, still clear in the memories of "old-timers" may help to put in perspective the impact—real or feared—of the appearance of 83 small creatures at Pismo Beach. On one particular minus-tide morning, 150,000 people were recorded digging what may have amounted to 1 million clams. "They came with forks, spears, shovels and swords" wrote the *Five Cities Press Recorder*. "Volunteer firemen from 3 cities came to patrol the beach with first aid equipment and resuscitators. At least 40 clammers suffered puncture wounds: 3 people drowned; 1 had a coronary; uncounted children were lost and wardens checking licenses and limit count gave up." (Naturally, that was an exceptional day; the next low-tide brought out only 60,000 people).

The Coming of the Supertankers

In 1968, the year Friends of the Sea Otter came into existence, we received word of an oil spill that occurred off the Russian coast in 1964. Soviet scientists documented the effects of diesel fuel and gasoline on sea otters:

> ...over 100 sea otters died as a result of polluting the shores of Paramushir Island in 1964. 1,000 tons of fuel covered 40 kilometers of coastline in the region where the greater portion of the Paramushir sea otters live. Observations showed that after getting into the slick, the otters first began to dive and turn over. Apparently due to getting wet and hypothermic, the animals' movements slowed and stopped. Afterwards, the tide carried out their corpses.
>
> (Barbabash Nikiforov, 1968)

This was the first reported oil spill accident in a sea otter habitat, briefly describing the suffering and death of the animals. It was a tragic example indeed.

Although amply forewarned by oil spills that have sullied other shores, we were staggered on March 24, 1989, when the supertanker *Exxon Valdez* ran aground on Alaska's Bligh Reef. The accident spilled 11 million gallons of crude oil into the pristine waters of Prince William Sound, unleashing devastation on the thousands of sea otters feeding and cavorting in the gentle swells, still acting out parts played long before the coming of man. Ah, how frightening is the speed at which evolution can be undone!

As the Zen Buddhist monk Suzuki Rosho remarked before his death, "When someone is dying, it is the greatest teacher." Over 1,200 miles of Alaska's coastline were blackened by toxic oil. Most life in and around those inlets, islands and reefs was wiped out, despite enormous, often heroic, but tragically disorganized rescue attempts.

More than 2,400 tankers—each transporting as much as 290,000 tons of oil—move through California's coastal waters each year, an area which includes the entire southern sea otter range. No progress has been made in reducing the risk posed by this enormous movement of a toxic substance. Seeking to minimize the threat posed to the California sea otter and allay public concern, in 1983, the Western Oil and Gas Association, a group representing 100 oil companies, submitted a 98-page document entitled "An Overview of Sea Otter Oil Spill Risk" to the U.S. Fish & Wildlife Service. In the report, the oil industry contended that the sea otter is not jeopardized by offshore oil activities and recommended that the southern sea otter be removed from the threatened list of the Endangered Species Act.

"The ships are only as good as the men who man them," said Ret. Captain Charles Domac, a Master Mariner who, for 16 years has worked as a marine surveyor, inspecting and salvaging large tankers that have broken down or run aground spilling oil. The *Exxon Valdez* is an illuminating example of exactly this point—with a drunken captain running onto a reef. "Despite the supertanker's history of only twenty years," Captain Domac continued, "it has brought more pollution and disasters to the sea and shore than all shipping in history."

On June 5, 1979, the California State Coastal Commission gave unanimous approval to a request by Pacific Gas and Electric (PG&E) to enlarge the present tanker facility by dredging at Moss Landing in Monterey Bay (which is now a National Marine Sanctuary) to accommodate supertankers up to 90,000 dead weight tons.

In response, Friends of the Sea Otter, led by its Director, Dr. Betty Davis, met with the Army Corps of Engineer's Director Col. John M. Adsit, expressing our concern about the risk of ecological destruction in the bay should an "inevitable spill" occur. We emphasized the seasonal current that would carry oil long distances southward, endangering valuable habitat and annihilating the entire breeding stock of the "threatened" southern sea otter.

One year later, on June 11, 1980, the Army Corps of Engineers denied PG&E's request, citing potential threats to sea otter habitat as the deciding factor. Colonel Adsit's decision was based primarily on section 7 of the Endangered Species Act, which stipulates that no federal agency action can jeopardize the continued existence of an endangered or threatened species.

Thus, the southern sea otter was to guard the Monterey County coastline, a continuing source of joy for residents and visitors.

The Endangered Species Act Comes Under Attack

It is Anne and Paul Ehrlich who repeatedly remind us that the extinction of a species will endanger man himself. But, in California this year, Governor Pete Wilson has stated that "species protection is a blunt instrument that costs us jobs...threatening to drive the workers to extinction." His uneasy reference is to the Endangered Species Act (ESA), first enacted by Congress 20 years ago and augmented by the Marine Mammal Protection Act, which establishes a commission of scientists and advisors to reduce the alarming worldwide depletion of sea mammals.

In 1977, the southern sea otter was designated a threatened species under the Act, following the substantive position of Friends of the Sea Otter, which aided the Department of Interior in its decision to list the otter, thus alerting the scientific community and the public at large to the need for a strong, positive response. Friends of the Sea Otter spearheaded a petition drive which collected 65,000 names from every state in the union supporting the listing of the southern sea otter as an endangered species. For FSO, the designation was a milestone, laying the foundation for protective measures as well as signaling official concern for preservation of the otters' critical habitat.

A major legislative battle has been waged in Washington this year as part of the periodic process of reevaluating and reauthorizing the ESA. Although brief moments of insight and human wisdom have surfaced at irregular intervals, some congressional antagonists allied with commodity and resource extraction interests, such as timber, oil and ranching, are introducing proposals that would have the effect of putting wildlife, plants and marine mammals already on the endangered species list at risk.

Opponents argue that "the Act tries to protect too much" when it extends protection to "subspecies" and "distinct geographical populations." This criticism clearly targets the southern sea otter *(Enhydra lutris nereis)*, a subspecies with a present census of 2,200 animals within a 220-mile range along the coast of California separated from the Alaskan sea otter *(Enhydra lutris lutris)* by some 3,000 coastal miles. It is an intolerant proposal that would remove the otter from the protection of the Act and nullify the preservation of other species living on remote islands or distinctly separate regions of the wilds.

However, Congressman Gerry Studds, chairman of the House subcommittee responsible for the Act, has introduced H.R. 4045, which would strengthen and reaffirm the Act.

Michael Bean, a lawyer and chairman of the Wildlife Program of the Environmental Defense Fund, serves as the leader and principal strategist in legislative efforts to augment legal protection for endangered species and wildlife habitats. "The single most important cause of species endangerment today," he says, "is the destruction of natural habitat."

This struggle underscores the importance of mobilizing a concerned citizenry to rise up forcefully to make their views known to legislators. Our voices are the most powerful weapon we have to protect the southern sea otter.

A Place of Wonder

For those who have never snorkeled, scuba-dived, kayaked, or even paddled around in a glass-bottomed boat, the Monterey Bay Aquarium, which opened in 1984, is the bow-window to a glorious new marine world. With financing provided by David and Lucille Packard and with Julie Packard serving as its Executive Director, it took shape from an idea, the unfolding of a purpose. Inspired by the work of Ed Rickets, the marine biologist known as "Doc" in John Steinbeck's stories of Cannery Row, the Aquarium was founded with an "ecological systems approach" focusing on all the interrelated creatures dependent on one another in Monterey Bay. The kelp forest tank, which soars three stories high, is an aquatic forest of giant kelp *Macrocystis*, with sun filtering down through the water to its "holdfast" root structure. Much of the life that accompanies it consists of sea urchins, anemones, abalones, sea stars and schools of darting fish.

In the two-story California sea otter exhibit, young otters twist, nose the glass, circle one another, munch food, then swoop up to the surface where the visitor may greet their eager faces from the floor above. But, downstairs, out of sight, are the tiny orphaned pups lying on waterbeds, bottle fed by their surrogate mothers (volunteers who truly give much of their days and nights to the pups during this crucial period of their development). These pups are truly the heartbeat of the Aquarium. From 1984 to 1992, the Aquarium treated 78 otters, both pups and adults, and placed 26 of them back into the wild. Out of 12 pups cared for and released, 5 have survived.

The story told by Carol Fulton, a former director of FSO, about one young otter at the Seattle Aquarium tells much about these extraordinary creatures:

> When we last left Tichuk he was six months old, the toast of Seattle, adored by his mother and good-naturedly tolerated by the adult male and two adult females with whom he shares his enclosure. Today, May 17, 1980, at one year of age, he is the honored guest at a birthday bash befitting the first captive bred and born sea otter pup ever to survive for more than 63

days. But what do we find? An enfant terrible!

Tichuk's diabolic plots to destroy the otter exhibit and cause the aquarium to run amok, have been splashed across newspaper pages nationwide. With craft and cunning, weighing himself down with a rock to better effect his dastardly deeds, he has dismantled the underwater lighting and water level stabilizer; removed the bolts and sealing strips from the glass fronted enclosure; drilled holes in the tank's concrete ledges and opened the door from the exhibit to the outside world of the aquarium.

A Definition of Sanctuary

What does it mean to give sanctuary to the ocean? Rachel Saunders, a leader at the Center for Marine Conservation, responded to that simple question with a simple answer when she said "A sanctuary is a wonderful opportunity to honor life that's there."

Truly, last year's establishment of the Monterey Bay National Marine Sanctuary, which embraces much of the southern sea otter's range, is the most beautiful and meaningful example of an act by the people. Using the words of Garrett Hardin, we can label it "The Commons," a benefit not for humans alone, but for an entire ecosystem filled with a rich and diverse marine life and a healthy habitat, hopefully guarded by pristine waters.

The largest marine sanctuary in the nation, it covers 5,400 square miles, reaching 53 miles offshore. But lines on a map do not guarantee protection, and much work lies ahead. Sewage effluent and industrial wastes, and toxics and pesticides from agricultural drain offs must be eliminated, and near-shore tankers carrying millions of gallons of crude from Alaskan oil fields must follow specific regulations along this coastline marked by dense fogs and stony outcroppings. The National Oceanic and Atmospheric Administration, concerned citizens and legislators continue to be vigilant in their efforts. In particular, former congressman Leon Panetta has championed the sanctuary, rescuing it from oblivion in Congress and speaking out on the various side issues that threaten it.

Yet, establishing a sanctuary such as that at Monterey Bay does not mean that we can remove ourselves from the system or relax our defenses. It is, rather, an expression of our determination to stand strong in assuring that the use of resources must be compatible with our primary goal—resource protection. As Baudelaire once observed, "The sea is your mirror, but as the clear, pure water becomes toxic and stained, we are finding only a reflection of ourselves—not a reflection of the life of the sea."

* * *

I tend to think that Friends of the Sea Otter is finding its symbol in the wave which lifts and falls, gathering momentum despite cross-currents, despite man-made intrusions of toxic wastes and sewage poured into coastal waters, despite oil spillage from increasing tanker traffic edging the coast and despite some unwelcome shores. Yes, everything is transient where the sea meets the shore.

We, in our struggle to guard the California sea otter, move toward our goal like the wave, startled by the mortalities resulting from shooting and otter drownings in gill and trammel nets, as well as the threats posed by oil spills and plastic perils. And then come the heavy storms wrenching young pups from their mother's clasp and washing them ashore to die or be rescued. The door is ever flung open to receive the unexpected—tides ebb and flow, mixing fact with idealism, science with emotional response. Thus, our growing knowledge engenders growing concern.

As the naturalist George Schaller describes it: "We seek the moral values in what we do; an obligation to fight for preservation, to struggle to the best of our ability to assure ourselves as well as the million private lives—a future."

The American Future

(continued from page 23)

pation in national dialogue on a sustainable future; and for awareness of and action on global and international environmental and social equity issues.

This agenda requires educational experiences that bring meaning to the idea of the future, that relate the land to human well-being, that instill a love of nature. It emphasizes the importance of science and history and political science and global education. It underscores the significance of current efforts to teach critical thinking skills. And it opens a new avenue to teaching values, in the context of the societal values needed to assure the preservation of the species and the natural environment. To be sure, sustainability presents many areas of contention. But sustainability also offers the chance for real-life dialogue within the classroom, meaningful dialogue that, in the final analysis, may be of great significance on the path to a sustainable future.

Notes

1. While this article looks at sustainability in the context of the U.S., any national sustainability program must of necessity include international and global elements. Agenda 21, the series of advisory recommendations resulting from the Rio Conference, is an important milestone in international concern for a sustainable future. The President's Council on Sustainable Development is charged with helping to implement these recommendations.

2. *New York Times*, "Heavy Hand of European Settlement," August 10, 1993.

3. See *The Rights of Nature*, Roderick F. Nash, University of Wisconsin Press, 1989.

4. John P. Diggins, *The Lost Soul of American Politics*, University of Chicago Press, 1986.

5. Among historians there is no agreement on the role that language and ideology played in the founding of the country. But it is clear that debate and dialogue, whatever the motives behind them, were crucial to the cause.

Teaching Strategy

Hey Kid! Don't Let Go Of That Balloon!

David J.W. Vanderhoof

This lesson tackles a current environmental issue—releasing helium balloons into the atmosphere—to show students how laws are enacted and how opinions on issues may be influenced. A few years ago students throughout the country became concerned about the death of marine animals when autopsies found they had ingested balloons or balloon pieces. This can cause a blockage of the digestive system of a turtle, dolphin or whale and cause starvation. They were motivated to act. In several states, students concerned about possible dangers to marine animals and the environment have lobbied against balloon launches. In Connecticut, for example, elementary school students testified before the General Assembly and largely because of their efforts, a bill restricting mass balloon launchings was passed. A student crusade has helped similar legislation in Florida, Virginia and Texas. The Pennsylvania and New Jersey legislatures considered limitations on mass balloon launches during their 1992 terms. Several cities also have ordinances against balloon launches.

Holly Pribble

Objectives

As a result of this lesson, students will be able to:

1. Achieve a practical understanding of the inter-relationship between environmental issues and the law;
2. Experience the challenge of drafting legislation; and
3. Develop critical thinking, public speaking and debating skills and work with peers in a collaborative manner.

Grade Level

This lesson is designed for students at the secondary school level, but is easily adapted for students at lower grade levels.

Materials

- Student Handout 1, the Balloon Release stories—note that there are two similar but slightly different stories
- Student Handout 2, "Balloon Fact Sheet"
- Balloon Launch Law
- Teacher's resource packet of news articles (see box on page 51)
- Copies of legislation in Connecticut, Florida, Tennessee and Virginia (see page 50-51)

Optional Outside Resources

A member of an environmental organization could discuss citizen action or "grassroots" participation in the legislative process or someone from the state natural resource agency could discuss administrative and regulatory efforts. A local legislator could add an understanding of the legislative process to the lesson.

Procedures

1. Give each student a copy of Student Handout 1, "The Balloon Release Story." *Note that there are two apparently similar but slightly different versions of the story,* one with an environmentalist slant, the other with a balloon industry slant. Copies of these stories should be intermixed with no hint that the information may be different.
2. Tell students to read and review their copy of "The Balloon Release Story."
3. Post signs at each end of the room: "STRONGLY AGREE" and "STRONGLY DISAGREE."
4. Make the following statement: "The legislature is considering the following proposed legislation." Then read or write on the blackboard one of the Balloon Launch Laws (see page 45).
5. Ask students to consider the proposed legislation. It may be helpful to have students reread the law.
6. Have students vote with their feet by positioning themselves under the sign of choice or somewhere in between the two signs (students should take with them their copy of

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David J.W. Vanderhoof is an attorney and scholar in residence at the Temple-LEAP Law-Related Education Project in Philadelphia.

"The Balloon Release Story").

7. Starting at one end of the human continuum you have set up between "Strongly Agree" and "Strongly Disagree," ask several students to explain their reasons for voting as they did (if necessary, ask questions to clarify a point). After a few students on one side of the issue have stated their views, ask students at the other end of the continuum to express their views. A resource person, if available, could also participate during this questioning process. Emphasize listening skills.
8. Thereafter, engage students in the middle and other positions for their views. The moderator and/or resource person may engage students after the initial statement of positions adding additional information. Depending on the time available, ask every student to explain their position or just get a sampling of views from selected students. Remind students that they may disagree with the ideas of others in the class but they should not criticize people for their views.
9. Ask students to review their copies of "The Balloon Release Story." Ask those students whose story refers to the Balloon Council in paragraph 2 to identify themselves and then ask students whose story contains the statement from the Balloon Alert Project in paragraphs 3 and 5 to identify themselves. Analyze and review the positioning or grouping of students with different versions of the "story." Does their position indicate that they voted based upon the information they were given?
10. Tell students that they may reposition themselves if they feel that they want to alter their initial position after listening to the reasoning of the other students or if they positioned themselves incorrectly in the first place. Ask students who reposition themselves to explain why they did so. Also ask selected students from one side to articulate the best reason they heard presented by the other side.
11. Take a vote on the proposed legislation. Review the voting results based on whether students were given the Balloon Alert Project or Balloon Council versions of the stories.
12. Give students copies of Student Handout 2, the Balloon Fact Sheet, and ask them to review the information gathered from newspapers throughout the country. The first portion of the Balloon Facts (ending with the *St. Petersburg Times* clip) contains information more favorable for the Balloon Alert Project, while the balance of the material provide arguments supportive of the Balloon Council's position.

Evaluation

The students' oral contribution provides an opportunity for authentic assessment of each student's ability to articulate his or her opinions. There are opportunities to evaluate written and other forms of expression in the extension exercises that follow.

EXTENDING THE LESSON

Exercise 1: A Legislative Drafting Session

1. Divide students into groups of three. Assign each group member one of the following roles: legislator, representative from the Balloon Alert Project and representative from the Balloon Council.
2. Instruct each group to write a Balloon Launch Law. The law could be written on flip chart paper so that when completed it could be posted on a wall in the classroom.
3. Have each group of students present and explain their version of the Balloon Launch Law. The moderator and/or resource person can identify and discuss drafting alternatives and suggest some problems of enforcement.

Exercise 2: A Legislative Hearing

1. Select one of the Balloon Launch Laws and tell students that it is a draft bill under consideration.
2. Have students count out the numbers one (1) through four (4) until all the class members have a number. Assign the roles for the legislative hearing as follows: Number 1—a witness from the Balloon Council who will testify against the bill; Numbers 2 and 3—Legislators; and Number 4—a witness from the Balloon Alert Project who will testify in support of the bill.
3. Tell the witnesses to write down the best arguments for their position, while the legislators prepare questions to ask both sides. During the development of arguments and questions students can work with other students playing the same

(continued on page 50)

Balloon Launch Law

It shall be unlawful for any person to release into the atmosphere within a one-hour period fifty or more balloons which are (i) made of a nonbiodegradable or nonphotodegradable material or any material which requires more than five minutes' contact with air or water to degrade and (ii) inflated with a substance which is lighter than air. Any person who violates this section shall be liable for a civil penalty not to exceed five dollars per balloon released above the allowable limit.

Balloon Launch Law

It shall be unlawful for any person to release fifty or more balloons made of any material which requires more than five minutes' contact with air or water to degrade. Any person who violates this law shall be liable for a civil penalty not to exceed five dollars per balloon.

(*Note:* Both of these Balloon Launch Laws are based on a Virginia statute, Va. Code Ann. Sec. 29.1-556.1 (1992))

Student Handout 1:

The Balloon Release Story

Saving the lives of harbor seals and sea turtles is far from being child's play, says Robert Schoelkopf, director of the Marine Mammal Stranding Center. But a child's toy and delight is making his job even more difficult. Foil and latex balloons accidentally or intentionally released into the atmosphere have been washing up on New Jersey's shoreline with ever greater frequency. Some coastal town officials and legislators see the problem as nothing more than a minor littering issue, but Mr. Schoelkopf regards it as something more insidious. Marine mammals, he said, have a tough time distinguishing such matter as inedible, and the balloons can lead to their illness and, in some cases, death.

"There are no documented cases in which a balloon was found to have caused a marine mammal's death, we're dealing with an urban myth" based on misinformation says Dale Florio of the Balloon Council. The amount of discarded balloons or balloon fragments found along the nation's beaches is minuscule compared with other waste. Balloons, particularly latex, or rubber, pose no environmental threat because the material biodegrades at a rapid pace, especially when exposed directly to oxygen, sunlight and water. Studies indicate that a latex balloon, depending upon the amount of exposure, breaks down as quickly as it takes an oak leaf to decompose, a matter of several weeks.

The Center for Marine Conservation, which sponsors a national beach cleanup event every year, said that of the 4,227,791 pieces of trash picked up in 1990, only 1.6 percent, or 26,536, were balloons or balloon fragments. That works out to a figure of about 200 pounds of balloon material out of a total of 2,645,000 pounds of trash. Latex trash figures are even lower. Many latex balloons released climb to a high altitude, where they freeze, explode and return to earth in shreds.

Much of the brouhaha over balloons has stemmed from the death of a sperm whale and a leatherback turtle on the New Jersey shore. In neither case could researchers pinpoint a specific cause of death. Nor were the balloons involved in those cases the latex type used in mass releases. Also, the turtle had a 3-foot gash in its shell, probably caused by a boat propeller, a common cause of turtle demise. The whale had injured itself by flailing against several piers.

Our love of balloons has created a $200-million-a-year industry built on latex, on letting go, on raising human spirits to the skies. Americans have marveled at the wonders associated with colored balloons ever since Ben Franklin purchased one for his grandson in Paris and brought it back to Philadelphia. Releasing balloons has acquired the social stigma of dumping toxic waste on a children's playground or stuffing asbestos in the attic of your neighbor's house. Four states have laws restricting balloon launches. The balloon industry, suffering a 30% decline in sales, calls it balloon hysteria.

Student Handout 1:

The Balloon Release Story

Saving the lives of harbor seals and sea turtles is far from being child's play, says Robert Schoelkopf, director of the Marine Mammal Stranding Center. But a child's toy and delight is making his job even more difficult. Foil and latex balloons accidentally or intentionally released into the atmosphere have been washing up on New Jersey's shoreline with ever greater frequency. Some coastal town officials and legislators see the problem as nothing more than a minor littering issue, but Mr. Schoelkopf regards it as something more insidious. Marine mammals, he said, have a tough time distinguishing such matter as inedible, and the balloons can lead to their illness and, in some cases, death.

Mr. Schoelkopf has examined five cases in which balloons might have contributed to the death of marine mammals, including an aged leatherback sea turtle and a small sperm whale, both of which washed up and were stranded along the Jersey coast. Post-mortem examinations of the animals revealed whole deflated balloons lodged in their digestive tracts, he said. In the whale's demise, a plastic foil-coated balloon was found intact in its stomach cavity. For years, mass balloon launches have served as a crowd-pleasing, exhilarating way to celebrate a special event. Children stare up from the ground, focused on the soaring mass of color as it spreads and finally disappears. Once a released balloon is about five miles up in the sky, it explodes into shreds and falls back to land or sea.

Many groups have canceled balloon releases in response to environmental concerns. Walt Disney World and Disneyland no longer color the skies above their theme parks with balloons. The Super Bowl and other football games are carrying on without a balloon launch at halftime. "We have no problems with balloons," says Susan Hibbard, a science teacher from Toms River, N.J., who founded the Balloon Alert Project in 1987. "As long as you don't let them go in the environment, they're wonderful."

Hibbard and others became concerned while leading children along a 100-yard stretch of beach at a state park and finding, every day, remains of anywhere from 20 to 50 balloons, washed in by the tide. They first saw it as littering, but expanded their concerns when they heard about the turtle and the whale. Using the balloon industry's conservative estimate that 10% of all balloons are mass released, Hibbard calculates that 2,700 tons of balloons are dumped into the environment each year—enough to cover a quarter of an acre and extend 140 feet into the air.

The Balloon Alert Project suggests a number of alternatives to releasing helium-filled balloons: tie balloons together in big arches and pull them down when finished; release balloons indoors, where they will be decorative for days; have a "kite day" instead of a "balloon day"; include balloon sculpture contests in art classes or have students plant trees or have a class adopt an endangered species as science project. Other suggestions include having to replace balloon weather experiments.

Student Handout 2:
Balloon Fact Sheet

From the New York Times, *April 19, 1992:*

Saving the lives of harbor seals and sea turtles is far from being child's play, says Robert Schoelkopf, founder and director of the Marine Mammal Stranding Center here. But a child's toy and delight is making his job even more difficult. Foil and latex balloons accidentally or intentionally released into the atmosphere have been washing up on New Jersey's shoreline with ever greater frequency, he said. Some coastal town officials and legislators see the problem as nothing more than a minor littering issue, but Mr. Schoelkopf regards it as something more insidious. Marine mammals, he said, have a tough time distinguishing such matter as inedible, and the balloons can lead to their illness and, in some cases, death.

Mr. Schoelkopf said that in recent years, his nonprofit center had examined five cases in which balloons might have contributed to the death of marine mammals, including an aged leatherback sea turtle and a small sperm whale, both of which washed up and were stranded along the Jersey coast. Post-mortem examinations of the animals revealed whole deflated balloons lodged in their digestive tracts, he said. In the whale's demise, a plastic foil-coated balloon was found intact in the stomach cavity. "These creatures see such matter floating in the water, consume it and the problem begins," Mr. Schoelkopf said. While he admits that there is no positive proof that the ingested balloon material was solely responsible for the deaths, "we do feel that it played some part in their ultimate fate," he said.

* * *

From the Los Angeles Times, *July 18, 1991:*

Kids and balloons go together like peanut butter and jelly, right? For years, mass balloon launches have served as a crowd-pleasing, exhilarating way to celebrate a special event. Children stare up from the ground, focused on the soaring mass of color as it spreads and finally disappears. Once a released balloon is about five miles up in the sky, it explodes into shreds and falls back to land or sea. In several cases, balloons or balloon fragments have been found in the stomachs of marine animals washed up dead on the shore. An ingested balloon or collected pieces can block the digestive system of a turtle or whale and cause starvation. Although there is no conclusive evidence that animals are dying directly because of ingesting balloons, a campaign started in 1987 has convinced many children that balloon launches are a threat to animals. Many groups are canceling balloon releases in response to the environmental concern. Walt Disney World and Disneyland no longer color the skies above their theme parks with balloons. The Super Bowl and other football games are carrying on without a balloon launch at halftime.

"We have no problems with balloons," says Susan Hibbard, a science teacher from Toms River, N.J., who founded the Balloon Alert Project in 1987. "As long as you don't let them go in the environment, they're wonderful." The Balloon Alert Project came about after Hibbard and her science-teacher husband, Peter, discovered a latex balloon in the digestive system of a leatherback sea turtle, an endangered species, found dead on the New Jersey shore. Concluding that the turtle died of starvation, the Hibbards founded the Balloon Alert Project to inform other teachers and students of their concern about the environmental effects of balloon releases. And consider littering, "The ocean is a big place," he says, "and I don't believe balloons are as important, in perspective, as plastic littering."

* * *

From the Chicago Tribune, *April 24, 1991:*

Word spread that balloons had been found inside dolphins and sea lions and had become a major source of litter. Peter Hibbard and his wife, Susan, both high school biology teachers, took off after the National Science Teachers Association, which had been tracking wind currents by having students release balloons across the country. In 1987, they formed the Balloon Alert Project, got the science teachers' project killed and turned their home in Toms River, N.J., into a sort of center for anti-balloon activities. They became interested in balloons when they served as volunteer naturalists at a nearby state park, leading children along a 100-yard stretch of beach and finding, every day, remains of anywhere from 20 to 50 balloons, washed in by the tide. They first saw it as littering, but expanded their concerns when they heard about the turtle and the whale.

"We never said, 'Don't use balloons,'" added Susan Hibbard. "We said, 'Don't release them into the environment.' We have nothing against balloons. But let's face it, releasing them outdoors is a legal form of littering. This is a terrible thing to teach children, that some kinds of littering are OK."

* * *

From the New York Times, *March 17, 1991:*

It makes a jubilant image: a colorful sweep of helium-filled balloons soaring into the air, then fading into tiny dots against a blue sky. But for 10-year-old Mandy Williams, the founder of Stop Harming Our Animal Friends, an environmental club at Turkey Hill Elementary School in Orange, this pretty picture has another side. Last spring, Mandy and several of her classmates told members of Connecticut's General Assembly that balloon launchings can harm animals, which have been known to mistake the deflated remnants for food and eat them. The children's testimony was aimed at persuading the lawmakers to vote for a bill advocated by the Cetacean Society International, based in Wethersfield, to restrict the launchings. As part of an all-school project that combined lessons in civics, science and writing, students wrote to the legislators, and some spoke at the bill's hearing.

* * *

From the Los Angeles Times, *February 11, 1990:*

Using the balloon industry's estimate of 10%, Hibbard calculates that 2,700 tons of balloons are dumped into the environment *each year*—enough to cover a quarter of an acre and extend 140 feet into the air, he says. "The balloon industry tells us it's not very much. What's very much?" Hibbard asked. "We're not anti-balloon. We're anti-litter." The two sides also argue over how long the latex balloons linger in the environment. Balloon manufacturers say the material is completely biodegradable, but environmentalists say balloons don't break down quickly enough. The potential hazards of balloons have received increased attention in recent years. The more common controversy involves silver-coated Mylar balloons, the metallic ones that have caused power outages in California and elsewhere when they tangled with electrical transformers. But more recently, other balloons have come under criticism from environmentalists concerned that they are killing wildlife and adding to the tons of plastic and rubber products polluting the earth.

According to information gathered by the Balloon Alert Project, a growing number of organizations have adopted formal policies against balloon releases. They include the National Education Assn., the University of Alabama, Hershey Park, the Philadelphia School District and the National Science Teachers Assn., which canceled its annual balloon weather project a few years ago.

Balloons are festive and fun, but according to some environmentalists, they are also dangerous to wildlife and litter the planet. The New Jersey-based Balloon Alert Project suggests a number of alternatives to releasing helium-filled balloons. The activists encourage school officials and others to:

- Tie balloons together in big arches and pull them down when finished.
- Release balloons indoors, where they will be decorative for days.
- Have a "kite day" instead of a "balloon day."
- Include balloon sculpture contests in art classes.
- Have students plant trees or have classes adopt an endangered species as a science project that replaces balloon weather experiments.

* * *

From the St. Petersburg Times, *February 9, 1990:*

Those broadside barrages of water balloons are now illegal, in addition to being dangerous. For the first time ever U.S. Coast Guard officials will be enforcing a new federal regulation against dumping of plastic-type materials from boats. That means water balloons, the favorite weapon of many pleasure boat pirates. The civil infraction carries a maximum fine that would cost a lot of treasure: as much as $25,000. The chief reason for concern about the balloons is their effect on wildlife. Seabirds and endangered sea turtles have died after consuming the remnants of the balloons in the past. They will be focusing on a different target: slingshot-type devices that have been used to fire the balloons from boat to boat. The Tampa City Council has outlawed slingshots to fire water balloons, because they have caused injuries in past events. In particular, party-goers have used long rubber-type cords to launch the balloons up to 100 yards or more. Use of a slingshot is a misdemeanor offense.

A Long Island teacher from the Half Hollow Hills School District learned of the risks of balloons because she owns a condominium in Brigantine. Kathy McEvoy visited the Marine Mammal Stranding Center just days before her sixth-grade class at the Otsego Elementary School was scheduled to take part in a schoolwide Balloon Day. Since the balloons had already been purchased, the school decided to go ahead with the launching, but many of Mrs. McEvoy's students protested the event with a quiet boycott. "I did not buy a balloon," said 11-year-old Derek Scheuren, "because they're killing sea creatures and polluting our area. In the future, this will only harm us, and I wouldn't want that to happen."

Currently, Mrs. McEvoy's students are writing to schoolchildren in Maryland whose names and addresses were discovered attached to tags on balloons that Mrs. McEvoy had found strewn along the beachfront in New Jersey. In their letters they are telling the Maryland children about the environmental hazards inherent in mass balloon releases—"spreading the word," as Mrs. McEvoy put it.

* * *

From the New York Times, *April 19, 1992:*

Dale Florio, director of public affairs for the Balloon Council, a lobbying group for the industry, called the charges and solution irresponsible. "There are no documented cases in which a balloon was found to have caused a marine mammal's death," said Mr. Florio, who is not related to Gov. Jim Florio. Dale Florio and the council said that "what we're dealing with here is an urban myth" based on misinformation and perpetuated by Mr. Schoelkopf, the center and misguided media attention in the past. Mr. Florio says the amount of discarded balloons or balloon fragments found annually along the nation's beaches is minuscule compared with other waste, a statement supported by nonprofit conservation groups that sponsor regular beach cleanups. While ingestion may occur, balloons are not a great hazard to marine mammals, the council insists, adding that the issue has grown out of proportion. Mr. Florio says balloons, particularly latex, or rubber, pose no environmental threat because the material biodegrades at a rapid pace, especially when exposed directly to oxygen, sunlight and water. "Our studies indicate that a latex balloon, depending upon the amount of exposure, breaks down as quickly as it takes an oak leaf to decompose," a matter of several weeks, Mr. Florio said.

The Washington-based Center for Marine Conservation, a nonprofit environmental agency that sponsors a volunteer-coordinated national beach cleanup event every year, said that of the 4,227,791 pieces of trash picked up off the nation's ocean and riverfront beaches in 1990, only 1.6 percent, or 26,536, were balloons or balloon fragments. That represents some 200 pounds of balloon material of a total of 2,645,000 pounds of trash. Latex trash figures in New Jersey are even less, said Diane Zeigler, a spokeswoman for Clean Ocean Action Inc., a Highlands-based nonprofit environmental group that monitors debris collections. The Balloon Council maintains that a large number of the latex balloons launched into the atmosphere climb to a high altitude, where they freeze, explode and return to earth in shreds. "The Balloon Council is encouraging people to be smart about balloon use," said Mr. Florio, adding that holding onto balloons during an event but disposing of them afterward provides for good environmental awareness.

* * *

From the Los Angeles Times, *July 18, 1991:*

The balloon industry views the controversy as a lot of hot air, and executives like Philip Levin, president of Balloon City U.S.A. in Harrisburg, Pa., are fighting back. To protest a bill against balloon releases in Pennsylvania, Levin released balloons daily from the Statehouse steps. The environmentalists are "destroying an entire generation of balloon buyers," claims Levin.

Levin has produced an eight-page comic book featuring Lex Latex, a talking balloon. "We're natural and nontoxic," explains Lex. "We latex balloons bring happiness and beauty to the world. We don't harm it." The comic book includes three experiments that kids can conduct at home to prove the biodegradable nature of latex balloons, Levin says.

* * *

From the Chicago Tribune, *April 24, 1991:*

Our love of balloons have created, a $200-million-a-year industry built on latex, on psychic release, on lift, on letting go, on raising human spirits to the skies, wonders associated with colored balloons ever since Ben Franklin bought one for his grandson on the streets of Paris in the late 1700s and brought it back to America.

On July 1, 1985, a 17-foot female sperm whale became stranded on the New Jersey coast and, despite efforts by Robert Schoelkopf of the Marine Mammal Stranding Center, died. An autopsy showed that, among many other problems, her intestines had been blocked by a deflated mylar, or nylon-based, balloon with 3 feet of ribbon attached.

Then, on Sept. 8, 1987, a leatherback turtle was found, badly decomposed, also on the New Jersey coast, also with a mylar balloon tangled in its innards, a detail noted during an examination performed by Peter Hibbard, a local high school biology teacher.

Much of the brouhaha over balloons has stemmed from these two incidents, though in neither case could researchers pinpoint a specific cause of death. Nor were the balloons involved the latex kind used in mass releases. Also, as the Balloon Council notes, the turtle had a 3-foot gash in its shell, probably caused by a boat propeller, a common cause of turtle demise. The whale had also injured itself by flailing against several piers.

"Look," said Treb Heining, a versatile balloon artist who directed the largest balloon release in history, 1,429,643 of them over Cleveland in 1986, "I started as a balloon seller at Disneyland when I was 15. I've been in the balloon industry for years, trying to spread joy and happiness. Now here comes a thing out of left field to attack me. Are you going to eliminate everything on the face of the earth that creates happiness? If you eat enough apple pie, you can die. And what about fireworks? Are you going to ban them because they put a few chemicals in the air? "It's very unfair to make this a litter issue," Heining added from the Los Angeles offices of his company, BalloonArt. "Where's the litter? Of all the stuff you see around, how much is balloons? If balloon releases were done every day, in every city, it might be a problem. That's not the case. A balloon that decomposes as fast as an oak leaf is not persistent litter." Heining gave up outdoor releases several years ago, though he says that for emotion arousal, nothing compares with them, not even fireworks. Now, he fears, the flap over mass releases is giving all uses of balloons a bad name.

The Balloon Council notes that, in one Florida beach sweep, balloon shreds accounted for less than 1 pound among the ton of litter collected. Of 228 balloons found, few were the mass release-type; 79 were beach balloons; 96 had strings, ribbon or thread attached, indicating personal use; 38 were miniatures; two were valved and three were shaped. Only 70, all biodegradable, could have come from mass releases.

For the nation's balloon-makers, their present dilemma is, to put it mildly, distressing. "Nothing fills so much space with so much color as a balloon," said Rick Tillotson, whose father, Neil, now 92, invented the modern novelty latex balloon in 1931. To him, a balloon remains a magical idea. "We see it go from a bit of rubber to something 10 times as big. A kid can catch, throw and bounce it without problems. It's like a bubble. Balloons are things we make to make people happy." He sounds hurt when people bad-mouth them. "Everybody who does a balloon release does it for some public-relations purpose," he said in a phone interview. "If they get calls, or letters from some 4th-grade class complains, they're not going to be doing it." Besides battling negativity about the uses of balloons, Tillotson said, the Balloon Council will push safety, urging that weights be attached to nonbiodegradable mylar balloons so that they will sink to the ground if dropped. Metalized ribbons trailing from balloons, which can cause trouble with power lines, should be banned. Parents should supervise young children who play with balloons and dispose promptly of shards.

Part of the charm of balloons, of course, is that they sometimes simply soar away, though Tillotson recently heard of a man who tied a cluster to a diamond engagement ring. His fiance became rattled and fumbled the handoff. The ring soared into the sky and was never seen again, at least not by them.

* * *

From the Los Angeles Times, *July 3, 1991:*

Releasing balloons has acquired the social stigma of dumping toxic waste on a children's playground or stuffing asbestos in the attic of your neighbor's house. Environmental groups say the globs of latex that rain down when the balloons explode can be fatal to wildlife. Four states have laws restricting balloon launches. The balloon industry, suffering a 30% decline in sales, calls it balloon hysteria. Balloon lobbyists also say latex balloons are unfairly lumped with Mylar balloons, those metallic balloons that can cause power outages if they hit utility lines.

(continued from page 45)

role. Resource persons could assist these groups by informing them that they can propose amendments to the bill.

4. Have students gather in groups of four, with each group composed of two legislators and the witnesses from the Balloon Council and the Balloon Alert Project. Each group should be composed of students initially assigned numbers 1, 2, 3 and 4. Each group will conduct a mini legislative hearing. The legislators will preside, giving each "witness" a chance to present the best argument(s) for his or her position. Time limits for each side's presentation might be three to four minutes. The legislators should ask questions as necessary to clarify the testimony. At the conclusion of the hearings, the legislators should discuss the matter between themselves, amending the bill if they wish, but they should NOT announce the result of the hearing.
5. Call the class back together and ask each pair of legislators to announce the result of the hearing on the proposed Balloon Launch bill and also to explain any amendments they may have drafted. Chart the decisions on the blackboard. A resource person can be most helpful during this debriefing and analysis of the decision.

Reflections on the Lesson

This lesson is an excellent way to show young people how laws are proposed, influenced and finally enacted. The use of different versions of the Balloon Release Story allows students to see how the presentation of information may alter opinions on issues of the day. The lesson stresses reading, writing, talking, and listening skills in an interactive and involving manner, and it encourages cross-curriculum studies. As a final follow-up to the lesson, students could contact a local legislator with "position papers" that reflect their views on this issue. They could also examine their community or school policy on balloon release.

Balloon Release Legislation

FLORIDA STATUTES 1991
TITLE XXVIII NATURAL RESOURCES; CONSERVATION, RECLAMATION, AND USE
CHAPTER 372 WILDLIFE
Fla. Stat. Sec. 372.995 (1991)

372.995 Release of balloons

(1) The Legislature finds that the release into the atmosphere of large numbers of balloons inflated with lighter-than-air gases poses a danger and nuisance to the environment, particularly to wildlife and marine animals.

(2) It is unlawful for any person, firm, or corporation to intentionally release, organize the release, or intentionally cause to be released within a 24-hour period 10 or more balloons inflated with a gas that is lighter than air except for:

(a) Balloons released by a person on behalf of a governmental agency or pursuant to a governmental contract for scientific or meteorological purposes;

(b) Hot air balloons that are recovered after launching;

(c) Balloons released indoors; or

(d) Balloons that are either biodegradable or photodegradable, as determined by rule of the Marine Fisheries Commission, and which are closed by a hand-tied knot in the stem of the balloon without string, ribbon, or other attachments. In the event that any balloons are released pursuant to the exemption established in this paragraph, the party responsible for the release shall make available to any law enforcement officer evidence of the biodegradability or photodegradability of said balloons in the form of a certificate executed by the manufacturer. Failure to provide said evidence shall be prima facie evidence of a violation of this act.

(3) Any person who violates subsection (2) is guilty of a noncriminal infraction, punishable by a fine of $250.

(4) Any person may petition the circuit court to enjoin the release of 10 or more balloons if that person is a citizen of the county in which the balloons are to be released.

TENNESSEE CODE ANNOTATED
TITLE 68. HEALTH, SAFETY AND ENVIRONMENTAL PROTECTION SAFETY
CHAPTER 101. MISCELLANEOUS SAFETY AND ENVIRONMENTAL REGULATIONS
Tenn. Code Ann. Sec. 68-101-108 (1992)

68-101-108. Limitations on release of balloons into the atmosphere—Exemptions

(a) No person, including an officer or employee of this state or any political subdivision thereof, shall knowingly release into the atmosphere more than twenty-five (25) balloons which are:

(1)(A) Made of a nonbiodegradable material; or

(B) Made of a biodegradable material that requires more than several minutes of contact with air or water to degrade; and

(2) Filled with helium or another substance which causes the balloons to rise or float in the atmosphere.

(b) Any person violating subsection (a) is subject to a civil penalty of two hundred fifty dollars ($250). Each balloon released in a single day, without a permit, in excess of the limit imposed in subsection (a), constitutes a separate violation.

(c) This section does not apply to weather balloons which are used for the purpose of carrying scientific instruments during the performance of an experiment or testing procedure.
(d) The provisions of this section do not apply to any county having a population according to the 1980 federal census or any subsequent federal census of:

not less than	nor more than
24,600	24,700
28,500	28,560
28,690	28,750
49,275	49,375
51,025	51,125
58,075	58,175
770,000	780,000

GENERAL STATUTES OF CONNECTICUT
TITLE 26. FISHERIES AND GAME
CHAPTER 490. FISHERIES AND GAME
PART II. GENERAL PROVISIONS
Conn. Gen. Stat. Sec. 26-25c(1990)

Sec. 26-25c. Release of lighter-than-air balloons restricted. Penalty

(a) No person, nonprofit organization, firm or corporation, including the state and its political subdivisions, shall knowingly release, organize the release of or intentionally cause to be released into the atmosphere within a twenty-four-hour period ten or more helium or other lighter-than-air gas balloons in the state.

(b) Any violation of subsection (a) of this section shall be an infraction.

CODE OF VIRGINIA
TITLE 29.1. GAME, INLAND FISHERIES AND BOATING
CHAPTER 5. WILDLIFE AND FISH LAWS
ARTICLE 5. PENALTIES IN GENERAL
Va. Code Ann. Sec. 9.1-556.1 (1992)

Sec. 29.1-556.1. Release of certain balloons prohibited; civil penalty

A. It shall be unlawful for any person to knowingly release or cause to be released into the atmosphere within a one-hour period, fifty or more balloons which are (i) made of a nonbiodegradable or nonphotodegradable material or any material which requires more than five minutes' contact with air or water to degrade and (ii) inflated with a substance which is lighter than air. Any person who violates this section shall be liable for a civil penalty not to exceed five dollars per balloon released above the allowable limit, which shall be paid into the Lifetime Hunting and Fishing Endowment Fund established pursuant to Sec. 29.1-101.1.

B. The provisions of this section shall not apply to (i) balloons released by or on behalf of any agency of the Commonwealth, or the United States or pursuant to a contract with the Commonwealth, the United States, or any other state, territory or government for scientific or meteorological purposes or (ii) hot air balloons that are recovered after launch.

Additional Resources

Public Relations Journal, October, 1990, "Children Deflate Balloon Launches," by Adam Shell.

Wall Street Journal, July 26, 1990, "The Balloons Are Up, But Look Out, Here Come The Kids," by David Stipp.

Chicago Tribune, April 6, 1990, "Balloon launch is burst by consciousness-raising," by Bruce Dold.

The New York Times, June 26, 1988, "Many Schools Canceling Balloon Launchings," by Joan Reminick.

Marine Mammal Stranding Center, Brigantine, NJ. Robert Schoelkopf, director and Keven Peter, education director. (609) 843-2350.

NOAA Marine Debris Information Office, c/o Center for Marine Conservation, 1725 DeSales Street, N.W., Suite 500, Washington, DC 20036; (202) 429-5609.

For More Information

In addition to the listing on page 65, several of the contributors to this issue provided lists of additional resources, but space limitations prevented their inclusion. To obtain a listing of these additional resources, contact the National LRE Resource Center, ABA/YEFC, 541 N. Fairbanks Ct., Chicago, IL 60611-3314.

The Right to Sustainability

Ecological Security in An Interdependent World

Patricia Mische

The Great Wall

Between the fifth and third centuries B.C., a series of walls were built in northern China by several warring kingdoms. The goal: to establish and protect their separate sovereignties and to ensure their security against nomadic invaders. Despite these walls, in 221 B.C. the armies of Qin Shi Huang were able to conquer the other kingdoms, making Qin the first emperor of a united China. To consolidate his power and assert imperial sovereignty, Qin ordered that those portions of the walls dividing the kingdoms be demolished, and those running along the northern frontier be connected and extended in a new "Great Wall" more than 6,000 kilometers long. Over 300,000 men were commandeered for the ten-year project and forced to work under great hardship; many died in the process.

Qin's ultimate purpose was immortality through a dynastic reign that would continue in perpetuity. But his new dynasty was short-lived: only fifteen years later, it was replaced by the Han dynasty. And today, few outside China know the name of the man who ordered the Great Wall.

Over the centuries, the wall fell into disrepair, a victim of the forces of nature. A number of rulers ordered it reconstructed or extended, but inevitably nature reclaimed it. Today, although its remaining portions are maintained as a legacy of human achievement (it is one of the few humanmade structures visible from space), the Great Wall has no real significance other than as a symbol for the security and sovereignty of China. In fact, it is a testimony to the long-term failure and folly of the human quest for territorial sovereignty.

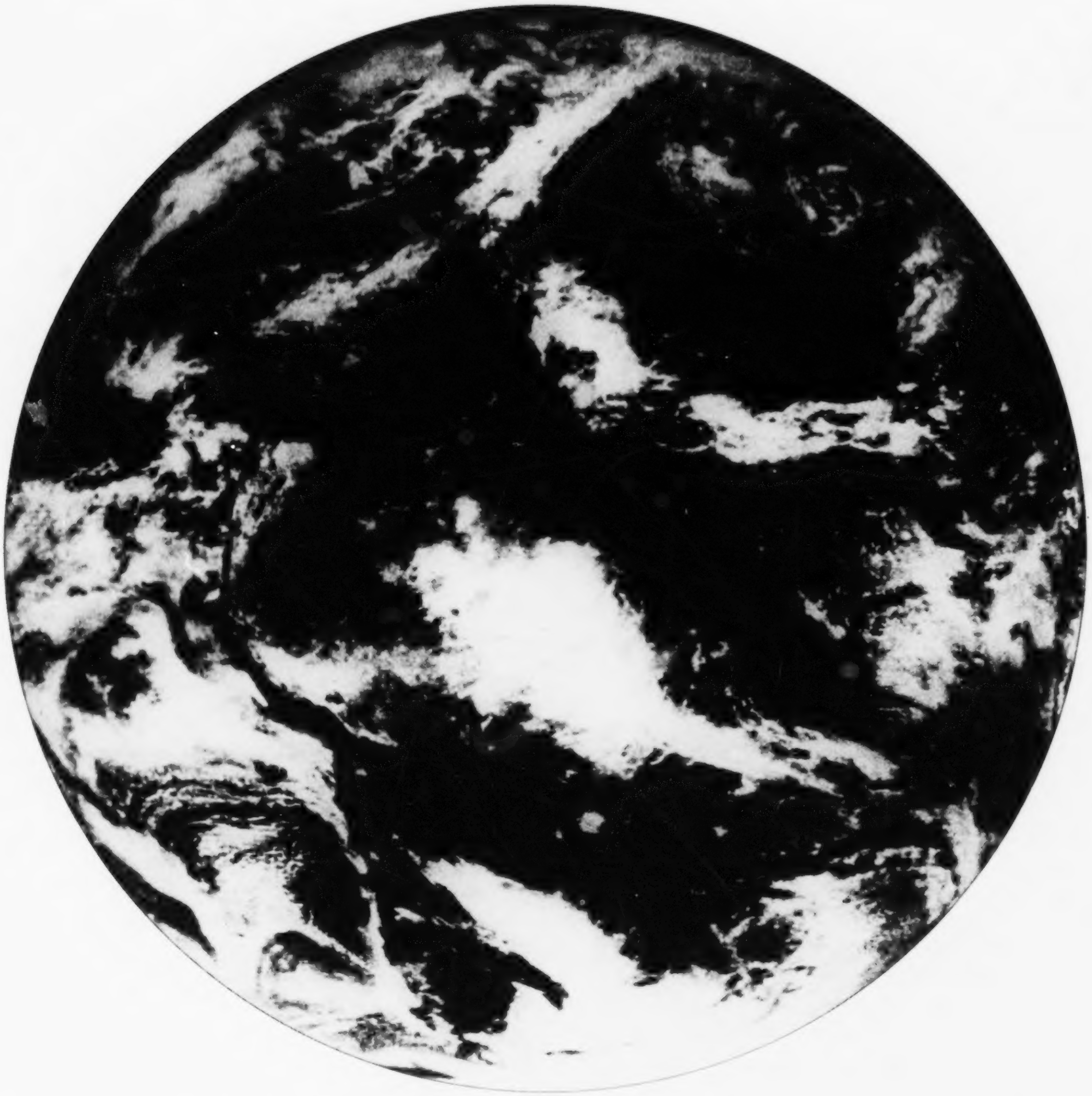
The wall is dwarfed by the mountain reaches on which it stands like a thin, nervous line. Life and power lie in the mountains, alive with a myriad of plant and animal species. Microorganisms turn stone to soil; insects, rodents and goats traverse the wall's ruins, nibbling plants that grow through the cracks, oblivious to the grand designs of humans. Trees on the slopes provide wood for fuel and homes; their roots hold soil and water against erosion and drought. Rain and melting snow flow in rivulets down the slopes, then converge in gushing rivers on their course toward lowland rice paddies which feed one billion people. China's security, now and in the future, depends ultimately on the integral functioning of these dynamic and interactive Earth processes.

It also depends on economic health. Thus each year the wall is overrun by thousands of foreign tourists, bringing foreign currency and foreign ways. Their presence is tolerated, even sought, because Chinese leaders know that a favorable balance of payments may be a stronger foundation for security in an era of global economic competition than military power or sovereign walls. The Great Wall's strategic benefit for China today is not that it keeps people out, but that it brings them in.

Long ago, cannons, and, more recently, tanks, planes and missiles, rendered obsolete such walled defenses around castles and countries alike. But even though the walls and castles have become tourist attractions, the wall as a metaphor for sovereignty has continued its hold on the human imagination.[1]

Today there is no walling out the rest of the world. In an age of transparency technologies and global economic and ecological interdepend-

Patricia Mische is co-founder of Global Education Associates, co-author of Toward a Human World Order *and author of* Star Wars and the State of Our Souls. *This article is reprinted with permission from the Summer/Fall 1989 issue of* Breakthrough, *a publication of Global Education Associates, Suite 1848, 475 Riverside Drive, New York, NY 10115, and is an adaptation of a longer research paper presented in Moscow, October 1988, at the conference "The Coming Global Civilization: What Kind of Sovereignty?" cosponsored by the World Order Models Project and the Soviet Political Science Association.*



AP/Wide World Photos

encies, great walls, whether on the ground or in the skies, are faulty metaphors for conceptualizing, as well as faulty strategies for protecting, sovereignty. Our national boundaries are more like the skin on our bodies: permeable membranes through which life flows between our own existence and that of the rest of the world. We share common vulnerabilities and possibilities, ever affected by each other's activities and by the life of the biosphere in which we subsist, and our respective sovereignties need to be understood in this interactive and dynamic context. It is no longer possible to wall each other out or in.

This assertion has to do not only with spatial relations across national boundaries but also temporal relations: our interactions across time with those yet to come, who will be affected by our decisions. All living creatures have a strong instinct to ensure their own and their species' continuity. Qin envisioned his life continuing not only through his progeny, but also through his achievements—his choices, actions and policies in the present. But he was deluded in thinking a wall could ensure this. Today a grand failing among humans is not that we are overly preoccupied with our continuity, but that we think about it too narrowly, in individual, territorial or time parameters that are too limited.

Unlike those tribal peoples who made decisions based on their effects on the seventh generation hence, we think only of the moment—or, at most, in terms of five-year plans. We have constructed mental walls between one generation and the next, between ourselves and our grandchildren, as if our choices, actions and policies had no bearing on their lives. We also give too little thought to our utter dependency, and that of our great-grandchildren, on the ongoing integrity of the Earth and its nonhuman as well as human species.

When we try to approach a resolution of today's ecological crises, we soon run into a central dilemma: *The Earth does not recognize sovereignty as we now know it.* Existing concepts of state sovereignty are incongruent, even antithetical, to the prerequisites for global ecological security.

Sovereignty Defined

Sovereignty as we know it has been defined as "a theory of politics that deals with an ultimate overseer or authority."[2] The legitimate locus of sovereignty has been perceived differently in different societies and periods. These variations are affected by how a given society has answered a central question: *Who can legitimately make or change the rules or laws? Who is the ultimate arbiter in maintaining order?* Many thinkers, including Aristotle, Bodin, Hobbes and Rousseau, have offered philosophical solutions. In questions of internal sovereignty (individual-state relations), the answer has variously been the monarch, the people (popular sovereignty), the constitution, the law, parliament, parliamentary and judicial institutions, or shifting pluralist groups. In questions of external sovereignty (inter-state relations), each state has generally upheld its right to be the final arbiter of decisions and rules affecting its affairs and territory.

The modern ideology of state sovereignty developed over the last four hundred years, parallel with the decline of feudalism and rise of capitalism and the nation-state system. A rising middle class tried to break the power of the aristocracy by asserting popular or constitutional sovereignty. At the time, many people still believed the world was flat, and the emerging scientific paradigm held the universe to be like a great machine with many separate parts. In the social extensions of this paradigm, societies and states were viewed as closed systems that could exist and function apart from others, sufficient unto themselves.

At a time when peoples and states lacked the travel and communications technologies to interact more than occasionally, and when prevailing economic systems made such interaction unnecessary, societies could and did function as entities unto themselves. In situations where territorial sovereignty was not threatened, there was not much need to define or defend it. But as new technologies emerged and economic and military interpenetration increased, the myth of absolute state sovereignty arose, possibly as a defense mechanism against more threatening forms of interpenetration and the fear of external domination.

Today, though the myth has proven persistent and resilient, it is beginning to be challenged, especially in the face of several new realities: (1) increasing global-scale interdependencies in economic, monetary, technological, military, cultural and ecological spheres (i.e., new transboundary systems and dynamics symptomatic of an emerging, though still incipient, global civilization); (2) the increasing capacity of the human to alter Earth's life-sustaining processes (i.e., new dynamics in human-Earth relations); (3) the increasing capacity of present generations to jeopardize future life (i.e., new dynamics in intergenerational relations); and (4) new scientific paradigms and knowledge about the way the Earth functions.

With regard to the latter, scientists are shattering atomistic and mechanistic worldviews with empirical evidence of a world comprised of multiple, complex, open, living, interacting systems. While our tribal ancestors, and spiritual visionaries through the ages, had an intuitive sense of powerful forces and laws governing their survival, an age of rationalism relegated these views to the realm of superstition. The new empirical evidence, supported by mathematical formulas and computer models, cannot be so easily dismissed. A reexamination of sovereignty and security needs to be undertaken within the framework of these new understandings.

None of the Earth's various bioregions are totally self-sustaining or sovereign.[3] There is only one air system and one water system, on which the entire planet and its human and nonhuman subsystems depend. So toxic materials released in one region are carried across entire continents by air or water; the chlorofluorocarbons (CFCs) released in one country deplete the ozone layer upon which all depend, regardless of non-use of CFCs elsewhere; excess burning of fossil fuels in one country contributes to a global greenhouse effect threatening all countries. Claims of national sovereignty or immunity are useless against these threats.

What is being said here, and what is underscored by most ecological threats, is that, in direct conflict with the prevailing concept of the absolute sovereignty of over 160 independently acting nation-states, *the sovereignty of the Earth is indivisible.*

Like air and water, birds and animals cross political boundaries. Fish respect no exclusive economic zones or sovereign fishing rights. Pollutants dumped in the oceans find their way, concentrated in fish and shellfish, back to our dinner plates. In the sovereignty of the Earth, to touch one part is to touch the whole. The destruction of the Amazon rainforests—the "lungs of the world," producing one-fourth of the world's oxygen supply—threatens not only Amazonian communities, but all breathing creatures on Earth.

What then does national sovereignty mean relative to ecological security? Who owns the rainforests? Who owns the ozone? Who can speak for Earth?

No modern philosophy of sovereignty provides an adequate answer to such questions. Each has a fundamental flaw: the locus of sovereignty—be it king, parliament, or people—is perceived to lie solely with humans, and to be limited within territorial confines. This homocentric and territorial perception excludes the deeper sources of power and authority in the cosmic laws that govern the workings of the universe, the Earth and the biosphere. Humans are only beginning to understand these laws which they did not make, which govern all human as well as nonhuman existence, upon which all human survival depends, and to which all human sovereignties owe allegiance.

Sovereignty as an Interactive Process

Any new vision of sovereignty for our times must have a larger frame of reference than the human alone; and it must be thought of not in fixed or territorial terms such as a walled state, but rather as a dynamic, interactive process involving a system of relationship and flow of energy and information between different spheres of sovereignty. Even among humans, sovereignty can dwell in more than one place at the same time: in a family, in people at local or national civic levels, in the state, in a global authority. The given situation, or agreed-on principles or laws, may determine who is the final arbiter; but this determination usually emerges out of a system of human relationships and interactions. In relations between the human and nonhuman worlds, at least four spheres of planetary activity affect the dynamic of sovereignty: (1) the biosphere, (2) the technosphere, (3) the sociosphere, and (4) the noosphere.

The first three have been described by many authors. The *biosphere* refers to the "sphere of life" or the space where life exists or may exist. It is the nature system comprised of the atmosphere, lithosphere, and hydrosphere, or air, minerals and waters of the Earth, all of which support living organisms and, indeed, are parts of Earth's life system. This system has evolved over more than four billion years, through atmospheric, geological and biological processes that long preceded the appearance of the human. Eventually a system emerged which made possible and now supports the life of humans; in turn, it is increasingly affected by human activities.

The *technosphere* is the system of structures made by humans and set in the space of the biosphere, such as villages and cities, factories, roads, vehicles, gas and oil pipelines, communication networks, power plants, dams, irrigation and drainage structures, farmlands, parks, etc. Though under human control, these components are also under the influence of the biosphere.[4] And every day humans produce new kinds of materials not found in nature, which may have unintended consequences in the biosphere.

The *sociosphere* is comprised of the prevailing political, economic, and cultural institutions humans have developed to manage their relations with each other and with the other two systems.[5]

In addition to these three, some thinkers, including French paleontologist Pierre Teilhard de Chardin (1881-1955) and Russian scientist Vladimir Vernadsky (1863-1945), have asserted the existence of a fourth sphere, called by Teilhard the *noosphere*. This is the new sphere of mind and spirit, of consciousness and reflective thought, which envelopes the biosphere. Put another way, the noosphere is "the biosphere as altered consciously or unconsciously by human activities."[6] In the view of both Vernadsky and Teilhard, this sphere is not only a portion of space, it is also an epoch which has emerged in time out of Earth's evolutionary processes, and, through the human, is now transforming the Earth.[7]

Most Western philosophers who considered the question of sovereignty did so exclusively within the realm of the sociosphere. They did not consider at all the interaction of human and nonhuman worlds within the larger biosphere, or sovereignty as a dynamic involving the interrelationships of all four spheres. And even within the context of the sociosphere, they did not foresee that multiple and diverse national, economic, and cultural sociospheres would become increasingly interdependent within an emerging *global* sociosphere; nor did they consider the impact of present policies on the health of future generations in a *multi-temporal* sociosphere.

We are now at a critical juncture in history and in inter-human and human-Earth relations. We are moving rapidly into a global civilization, and into a period in which humans, with their new knowledge and technologies, have increasing power to intervene in the biosphere and affect the next stage of planetary evolution, including the health of future generations. But we have not yet developed the commensurate mental or moral tools, or an adequate philosophy or ethic, much less an adequate global polity and policies, to guide our new interrelations in a way that will ensure human survival and well-being. There has been a tragic lag in human development which we are now challenged to overcome.

In this new historical context, sovereignty needs to be reconceptualized within a total-systems context as a dynamic process involving multi-spatial, multi-temporal, multi-species and multi-systems interactions. It is dysfunctional to wall ourselves in or out in separate space or time zones, or even separate species zones; and it is dysfunctional to consider sovereignty as a static state. Sovereignty needs to be viewed in a fluid, relational, dynamic context, with multiple spheres of activity, authority, control, and laws affecting any given situation. Such a reconceptualization will be critical to the healthy functioning of any coming global civilization and of the planet itself.

Not In My Back Yard

I *am not* recommending here the total *abandonment* of the principle of national sovereignty. Paradoxically, global ecological security may require the strengthening and protection of national sovereignty on the one hand, and on the other, some pooling of it in the global community or sociosphere, for the sake of the ecological security of all. Without pooling some sovereignty in strengthened global systems and international law, individual countries cannot protect themselves against ecological threats from outside their borders. Even threats from within the country may be so entangled in global economic, political, or military dynamics that the situation cannot be resolved without global cooperation.

The situation of many poorer countries exemplifies the paradox. Poverty is a cause as well as an effect of environmental degradation in many developing countries. As the Brundtland Report on Environment and Development states, "It is mass poverty which drives millions of people to overexploit thin soils, overgraze fragile grasslands, and cut down yet more of the rapidly disappearing tropical forests, these great lungs vital for the global climate and thereby for food production."[8] *Therefore, in seeking effective environmental solutions, economic imbalances must also be addressed.* What is needed is sustainable development that simultaneously supports economic growth, a more just and equitable distribution within and among nations, political reforms, and a fair access to necessary knowledge and resources—without compromising the ecosystem and with it the ability of future generations to meet their needs.

This is a tall order for any society, even in the best of circumstances—but it becomes almost impossible for poorer countries confronted with debilitating foreign debts, rising interest rates, interrupted financial flows, and adverse terms of trade. Such all-too-common circumstances have led many countries to overuse their resource base, export precious natural resources and ignore environmental degradation for the sake of short-term economic survival.[9] Because the economic forces involved cannot be controlled locally or even nationally, many poorer countries cannot extricate themselves from this predicament unilaterally; a concerted, cooperative approach to problem-solving at the global level is required.

But even while many developing countries call for more cooperative and equitable international systems, they have also been pressing for greater national sovereignty. This apparent contradiction is not a failure in logic, but a pragmatic recognition of some global forces making havoc of their development goals. In light of the continuing colonial and neocolonial legacy, in which their resources are plundered, their labor exploited, their cultures eroded, and their environmental health degraded, the attraction of national sovereignty is understandable. In light of some of the ecological threats they face, it is doubly understandable. For example, many developing countries have become victims of "toxic terrorism," their lands and waters used as garbage dumps for the toxic wastes of the richer, more industrialized countries. Sometimes big profits are involved. While companies have to pay $250 to $2,500 a ton for toxic waste disposal in the U.S. and Europe, where they are also required to follow strict disposal guidelines, deals have been made in Africa for only $3 to $100 a ton, no environmental-impact questions asked.[10] Often the profits go to middlemen who contract to dispose of the waste at one price and pass on only a portion to Third World recipients.

Latent racism, in the new form of "ecological apartheid," may also be involved. Those exporting toxic waste would often be loath to dump it in their own neighborhoods, affecting their own children, but have fewer scruples about putting African, Asian or Latin American children at risk. So too, minority and poorer people within the richer countries, such as Native Americans in the U.S., are especially vulnerable to having their lands used as toxic dump sites.

The resulting NIMBY (Not In My Back Yard) response by peoples of Africa, Asia, Latin America and the Pacific, therefore, has a legitimate place in an ecological strategy. In fact, it may be negligent not to raise sovereign flags against ecological threats from outside one's borders. Such assertions of national and regional sovereignty—and insistence that those who produce the garbage must be responsible for it—may be at least a start toward protecting present and future populations from the effects of toxic dumping.

However, while important, the sovereign NIMBY approach by itself is not adequate to resolve all or even most threats to ecological security. It would not be a relevant strategy in dealing with the ozone or global greenhouse threats, which require comprehensive global solutions. And in some cases local and national environmental efforts, lacking the protection of global systems, have triggered harsh reprisals from powerful economic or political interests.

In an increasingly interdependent world, all are vulnerable to the actions of a few. The great irony is that, in spite of the common view that sovereignty is a prized possession of which an approaching global civilization threatens to rob us, *we have already lost it*—and yet, in its name, we have failed to develop global institutions capable of protecting the very security and sovereignty we desire.

Why International Agreements Are Inadequate

If we turn our attention to existing international agreements related to the environment, we find two distinct and seemingly paradoxical trends: on the one hand, increasing numbers of international agreements; on the other, increasing environmental degradation.

Since 1921, there have been over 140 international multilateral treaties and other binding agreements related to the environment. (In addition there are many nonbinding resolutions and declarations, such as the 1972 Stockholm Declaration and the 1982 World Charter for Nature.) All but two of these multilateral treaties were adopted in the last fifty years, and over half in the latter third of that period. At first glance this trend suggests a growing readiness to transcend state sovereignty and develop cooperative efforts to deal with transboundary environmental problems. How then can we account for the fact that, in the same period, environmental degradation seems to be getting worse?

A number of factors need to be considered. First of all: is environmental degradation really getting worse, or does it only seem worse because we are now more aware of it, with more precise ways to measure and predict it? Certainly, since the 1960s, public consciousness regarding risks to the Earth has grown considerably. Numerous books have contributed to this, as have the increasing numbers of environmental conferences and organizations. The 1972 U.N. Conference on the Environment in Stockholm put environmental issues on the global agenda for the first time in a concerted way, increasing exponentially public understanding of ecological dangers, establishing agreement on some principles of environmental protection, and bringing forth the United Nations Environment Programme. And space-age technologies have given us all a new, shared image of our one Earth as well as new instruments to detect and monitor ecological problems.

Still, this is not an adequate answer to our paradox; for these same technologies provide evidence that some problems, such as depletion of the ozone layer, are really getting *worse* and may continue to do so unless we restrict certain pollutants.

A second possibility, of course, is that many of the treaties are too recent to have had much effect. For example, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer only came into force in 1989; the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal is not yet in force. For some ecological problems, including ozone depletion, a long leadtime is required before a human remedy will have an effect in preventing further damage.

But the fact is that the Montreal Protocol was considered inadequate by experts even before it entered into force, because it only requires gradually reducing CFC production to 50 percent of 1986 levels by the end of the century, and makes exceptions for developing countries with lower CFC outputs. Some scientists predict that, under these allowable levels, ozone-depleting chemicals in the atmosphere will not decrease, but actually double in 50 years.[11] This is why another intergovernmental meeting was convened in London in March 1989, at which 12 European countries decided to totally eliminate their production and use of these chemicals by 2000.

Similarly, the Basel convention on toxic waste was considered by many experts to be too little, too late, even before the ink dried. Existing levels of toxic waste, some of it dumped on unknown sites in unlabeled, erodible containers around the world, will affect untold numbers of people far into the future. And the Basel agreement does not halt future commerce in poison; it only takes a cautious step toward regulating it by requiring exporters to get importing countries' permission. Even that requirement is full of loopholes; toxic waste expert James Puckett called it a virtual "international stamp of approval" on continued toxic dumping.[12]

This underscores a third possibility: despite their increasing numbers, existing international treaties are simply not adequate in the face of the gravity of our situation.

Indeed, most existing treaties are seriously limited. Many focus primarily on economic or military goals and are only secondarily or peripherally related to ecological security. Most were undertaken piecemeal and/or are limited to selected pollutants, regions, or species, with little or no coordination between them. They were reactive rather than anticipatory: while a treaty might cover one substance currently deemed a public health threat, hundreds of new substances, equally or even more dangerous, could be produced tomorrow. Or toxic substances prohibited from use in one region could be dumped on the markets of another. Many of the treaties dealing with pollution are limited to controlling or regulating, but not prohibiting, dangerous substances—or they are full of loopholes, or have been ratified by only a few countries, not necessarily those most responsible for the problem. Those states not wanting to be obligated by treaty requirements simply avoid ratification, or work to water down or eliminate clauses they don't want to be bound by.

Even when ratified by significant numbers of countries, most treaties are very weak in compliance or enforcement measures, or ignore it entirely. Cautious steps are taken toward cooperating in research for purposes of making recommendations, or undertaking education or the exchange of information, but when it comes to real environmental protection the treaties stop short.

Finally, much of existing international environmental law further defines and reinforces state sovereignty, even while the very nature of ecological security requires pooling or transcending it. Evidently the treaty process did not go deep enough. While the rapid increase in international environmental agreements represents growing public concerns about ecological security, the process of intergovernmental "treating" was undertaken within the constraints of outmoded concepts of sovereignty and security. So over 140 treaties were negotiated that attempted to deal with transboundary environmental problems without the parties first having undertaken the global mind change that is a prerequisite to resolving these issues.

Moving Toward Global Governance

On the other hand, some of these international treaties do represent beginning efforts of the states that are parties to cooperate regionally and globally, and to harmonize their national laws relative to transboundary issues and interests. And a few take first steps toward limiting or reconceptualizing sovereignty on behalf of the global common good.

In this latter regard, several treaties deserve special attention: the 1959

Antarctica Treaty, which in effect made Antarctica a global commons; the 1967 Outer Space Treaty, which declared that outer space was "not subject to national appropriation by claims of sovereignty, by means of occupation, or by any other means"; the Law of the Sea Convention, adopted in 1982 but not yet in force, which features explicit mention of "global commons" and "common heritage"; and a cluster of treaties related to weather and climate. (In 1988, the U.N. passed a promising—though nonbinding—resolution on "Protection of Global Climate for Present and Future Generations of Mankind," to be followed up at the Second World Climate Conference in 1990.)

Though the first three treaties above were not aimed primarily at ecological protection, and were limited to specific regions or spheres of the planet, they established some precedents in designating certain regions as global commons, and in attempting, even if not always successfully, to limit or transcend sovereignty there. We must remember, of course, that when these treaties were adopted, few countries were yet at a point where they could economically exploit the remote regions of Antarctica, outer space, or the deep sea-beds; perhaps this accounts for the relatively low initial resistance to forgoing claims on these areas.

Furthermore, many governments recognized that it was in their national self-interest to demarcate these regions as global commons, to prevent their being seized by more powerful states. This indicates that self-interest can be a force not only for resisting global systems of governance, but also in moving toward them.

In any case, the trend toward recognition of global commons areas is not an isolated phenomenon. The past few decades have in fact seen a growing tendency toward the development of global-level public policy in all areas of human concern. A 1979 study by Robert Manley confirmed that global-level policies have proliferated since 1945; in addition to the environment, the study covered 47 other areas, ranging from economic, educational, health, scientific, social and communications issues to common-use areas. In all these fields, although national sovereignty remains a considerable force, global-level policies and systems exist in various stages of development. They may evolve grudgingly and with little coordination, but the push toward global systems of governance is unmistakable.

Toward a More Effective Global System

A global system of ecological security must be at least as strong as the existing and anticipated strains placed on it. It must take into account many interacting forces, including cultural, political, psychological, philosophical, economic and military. Of these, I would like to discuss briefly the following: (1) a strong and effective global polity; and (2) a global culture of ecological responsibility. The former is important; the latter indispensable.

Strong and Effective Global Polity

Multiple spheres of human choices and activities—in both public and private sectors, and at local, national and international levels—have an impact on ecological security. Thus the question is not whether we need governance in all these spheres, but rather, how much in each sphere? How much should be left to the private sphere, and how much authority or sovereignty pooled in the public sphere to resolve ecological problems? How much at local, national and global levels?

Subsidiarity. In trying to balance these spheres, my preference is to be guided by the principle of subsidiarity. Simply stated: whatever can be managed at the local level, should be. Only when a problem exceeds the competence of a particular locality should it be taken up by a larger social structure. Thus, referring to a global problem does not necessarily mean that all its aspects can or should be resolved globally. Many dimensions of ecological security can be handled locally or bioregionally. Local peoples often have intimate knowledge and experience of local terrains and ecosystems, as well as a sense of roots and continuity with a given place, which nurtures a commitment to its ecological health and future.

However, many environmental problems, particularly transboundary ones, cannot be resolved through local polities alone. In this case national, regional, and global systems are needed. The point is to have effective polities and policies in place at all levels where decisions and action may be required. And while local and national polities are relatively well developed—though environmental law may also need to be strengthened at these levels—there is still a long way to go in the development of an effective global polity for ecological security.

Strengthened international environmental law. Existing international environmental agreements have been piecemeal, uncoordinated, and often too little too late. A more comprehensive and effective system of international laws and structures is needed. Some normative foundations for such a system have been established, albeit mostly in the form of nonbinding declarations and resolutions such as the 1972 Stockholm Declaration, the World Conservation Strategy, the 1982 Nairobi Declaration, and the 1982 World Charter for Nature. They need to be further developed, refined, and given enforcement teeth.

An Ecological Security Council. In addition to strengthened international law, a stronger global authority is needed to deal with issues of ecological security. The existing United Nations Environment Programme (UNEP) has little real authority other than the power of its research and information, its educational programs and materials, and its ability to convene meetings and draft resolutions. While it has made important contributions in shaping global ecological awareness and policy development, its efforts are constantly challenged under the banner of national sovereignty.

Some have suggested reconstituting the U.N. Trusteeship Council, which has now virtually completed its Charter mandate, as an Ecological Security Council with authority comparable to the existing Security Council. Others think this too politically difficult because it would require revision of the U.N. Charter; building such a Council from scratch might be easier. Another approach would be to strengthen UNEP by raising it from Programme to Council status.

However it comes into being, the mandate of such an authority should be to safeguard global ecological security. Its functions should include: (1) the prevention of global ecological crises (by way of early-warning systems, data collection and global policy development); (2) quick and effective response to global ecological crises; and (3) dealing with grievance and compliance questions relevant to international environmental law. In the latter case a special Commission might arbitrate disputes or refer then to the World Court. This implies also the development of an international criminal code relative to ecological crimes.

Admittedly, questions of compliance have been the weakest aspect of international law and global-systems development up to now. In the case of ecological crimes they become especially complex, because so many actors are in the private sector. Should the Nuremberg principle, which held that individuals can be held accountable for war crimes, be applied to crimes against ecological security? In the face of critical issues of future human survival can we afford to evade such questions?

Other international organizations and systems. It will be difficult, if not impossible, to advance very far toward ecological security without simultaneously cooperating to solve problems of foreign debt, massive poverty, monetary and trade imbalances, and other economic pressures on the world's poorer countries; or for that matter, to end the exploitation of poorer countries by the rich. Stronger, more just and more effective global economic systems need to be developed as an integral aspect of global ecological security.

In addition, international organizations currently dealing with world health, food, agriculture, the oceans, outer space, human rights, arms control and disarmament, all deal to some extent with aspects of global ecological security. It is now essential that their roles be defined and coordinated more effectively; this could be done through linkages with an Ecological Security Council.

A Global Culture of Ecological Responsibility

But ultimately, without the development of a global culture of ecological responsibility, it is unlikely that international law can be enforced or effective. After all, though today more than 61,000 international treaties cover almost every conceivable area of concern[14] they often don't work because they have not involved ordinary people. An effective system of ecological security requires the development of a powerful cultural force to tell the political force what to do, and to hold it accountable.

To speak of a global cultural force does not mean the loss of cultural diversity; a global ecological ethos and ethic can be developed within the contexts of a diversity of living cultures and traditions. This is the area some call "soft law"; but it can sometimes be more demanding—and can win more adherence—than the so-called "hard" law of statutes and constitutions, because of the power of the collective conscience, public opinion and group sanctions.

The United Nations Environment Programme recognized the importance of developing a global ecological ethos through the wellsprings of diverse cultures when it launched its Environmental Sabbath project in collaboration with religious networks. The goal of the Environmental Sabbath is to enlist the world's faith communities in forming an ecological consciousness and conscience through their worship services and educational programs, within the framework of their own beliefs and traditions.

Hard and soft law are both necessary; they are interactive and can be mutually reinforcing. Global legal structures are necessary to deal with belligerents whose actions jeopardize the well-being of the whole. But in the final analysis they must build on the law in the minds and hearts of people.

Sovereignty as shared responsibility. Today, concern for the future of humans and the Earth is growing in the minds and hearts of many people around the planet. In the absence of governmental leadership capable of coping with global-scale crises, people's movements have begun to assert their own leadership and to collaborate across national borders on behalf of their common future. In the process, an invisible global polity has begun to form that pays less and less attention to philosophies and declarations of state sovereignty. This polity is implicitly redefining sovereignty as shared responsibility for the fate of humans and the Earth.

One indicator of this is the proliferation of international nongovernmental organizations, of which there are today more than 18,000, the majority born in the latter half of this century. (By comparison, there are only about 2,000 intergovernmental organizations.)[15] Many are pressing for a stronger voice in the United Nations, arguing that nation-states are not the only legitimate actors in shaping global policy. Many are working for a world community based on greater peace, justice and ecological balance. They monitor and respond to a wide variety of global concerns, including human rights, hunger, health, peace and disarmament, economic development, and many issues related to global ecological [illegible]y. Among the latter are efforts to save the rainforests, save seed stock otherwise lost to monocropping, save endangered species, develop and share ecologically sound technologies and energy alternatives, and promote aquafarming, soil conservation, land trusts, and so forth. Members often come from many countries, religious beliefs and political persuasions; their commitment to the future of the planet motivates them to rise above these differences in cooperative action.

Citizen diplomacy and citizens' treaties. The work of this invisible global polity has included many citizen-diplomacy initiatives in the 1980s. They were first undertaken on behalf of world peace. Tired of Cold War hostilities, and seeing that all the petitions to governments had not brought an end to the arms race, ordinary citizens decided they could no longer wait for intergovernmental initiatives and began building peace through people-to-people diplomacy.

Similar citizens' initiatives have been undertaken on behalf of environmental protection. One such effort is the Earth Covenant: a Citizens' Treaty for Common Ecological Security, whose ultimate goal is to have as many people from as many countries of the world as possible make a covenant with each other to take responsibility in their personal, professional and organizational lives for local, national and global environmental health. It is hoped that the Earth Covenant will also form the basis for drafting a comprehensive, intergovernmental treaty on the environment.

The Challenge

Gaia, the name of the Earth goddess in early Greek myth, has been resurrected in some circles as a metaphor for the living Earth (a planet that is alive, as distinct from a planet that has life on it);[15] for many, the photo of the Earth from outer space (see page 53) has become an icon. We need to take this process further and reawaken in ourselves a sense of our unity with—indeed, our identity with—the Earth. We need a transformation in worldviews, by which we come to see that the Earth is like a single cell in the universe; that the human is not over the cell, but a part of it; and that we will live or die as this single cell lives or dies.[16] Without such a fundamental change of mind, it is likely that any emerging global civilization will simply extend existing paradigms and problematics to new global levels of danger.

Ecology is a new cultural force. It necessitates the development of a massive growth of consciousness by humans relative to the impact of our choices and activities on the fate of the Earth. In building the new global culture of ecological responsibility, the following values must be generated, taught, and institutionalized:

- *reverence for all life*: valuing the other, including all other life forms;
- *the concept of universal harm*. We must anticipate the effect of our activities and products on the total life system;
- *intergenerational equity*: an appreciation of future generations and their dependency on our choices;[17]
- *respect for diversity*. Evolution has proceeded on a path of increasing diversity and complexity. This has implications for interhuman relations: true security can never be based on domination or elimination of differences. We need to respect and value the many cultures in our global sociosphere. It also has implications for human-Earth relations: true ecological security requires that we cherish the diversity in nature and learn the art of coexistence with other life forms as well as other humans;
- *communion*: affirmation of the ways in which, despite all our diversity, we share in one life and are mutually interdependent. Each reality of the universe is in communion with every other reality within the unity of the entire world order.

Most of all, we must learn to live on the Earth with consciousness and intentionality, and not just surrender to custom. The future is increasingly a matter of human choice and human freedom. We need to will our way of life and take responsibility for creating a future in which life can continue in its incredible variety and beauty.

Notes

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Teaching Strategy

Walls, Sovereignty and Nature: Ecological Security in an Interdependent World

Veronica Focseneanu

The following two lessons are based on an article by Patricia Mische, "Ecological Security in an Interdependent World," *originally published in* Breakthrough, *Global Education Associates, Summer/Fall 1989 and reprinted on page 52 of this issue of* Update. *These interdisciplinary lessons expand through imagery, pictures, and written descriptions the concepts of walls or barriers, sovereignty within walls, and the spatial dimensions of the natural world which defies boundaries, sovereignty and man-made laws. It is an innovative expansion of law-related education. The first part of Lesson One, which uses Student Handouts 1 and 2, is appropriate for upper elementary as well as middle secondary students. Lesson Two is upper secondary.*

Objectives

At the conclusion of these lessons, students should be able to:

1. Develop and express opinions on the relationship of man and nature.
2. Draw comparisons between the natural and the human-made world.
3. Develop awareness of the interdependence of man and nature and unwritten laws.
4. Develop awareness of protecting the integrity of the Earth for future generations.

Time Required

Two class periods

Materials

1. Set of pictures of walls (see the following page for some suggestions)
2. Picture of the Great Wall of China
3. Copies of Student Handouts 1, 2, and 3 (pages 62-64)
4. Copies of Student Assignment
5. Transparency

Procedures: Lesson One

1. With the help of a musical background (i.e., a calm, relaxing melody, perhaps one of Jean Michel Jarre's), begin in a calm voice, using pauses while you speak: "Close your eyes and imagine yourself walking on a road. . . . Suddenly you find yourself in front of a wall. . . . Imagine what the wall looks like. . .is it high or small?. . . . What kind of material is it made of?. . .is it old or new?. . .would you like to pass over it. . . ? If so, how?. . . by climbing it? . . . by looking for a hole in it? . . . by destroying part of it?. . . avoiding it?. . . digging a tunnel under it? . . . . For those who have not stopped at the foot of the wall and who have managed to go beyond it. . . imagine what you see . . . . Now open your eyes."
2. Stop the music and ask two or three students to briefly describe their experiences. Invite them to interpret their vision. (For example: the wall is an obstacle/challenge they think they may have in their lives. Surpassing the wall or not, it could represent attitudes when confronted with obstacles. The image beyond the wall represents the way they imagine their futures.)
3. Point out that obviously the wall was an imaginary one. We often raise imaginary walls in human relations because of enmity, fear, xenophobia, etc. Ask the students to name some real, material walls with which they are familiar. Why do people raise walls/fences?
4. Ask the students to work with their partners. Display the set of pictures with walls. Tell them to choose an image and discuss it in their pairs. Write on the board what they determine is the symbol of the wall. Suggestions: defense/protection; intimacy; separation; superstition; necessity; fear.
5. Tell your students that sometimes there are other reasons for raising walls. Display photo of the Great Wall of China. Ask why it was erected. Divide the students into two groups. Provide students with Student Handout 1 and Student Handout 2. Allow four to five minutes for the students to read the material. Invite a representative from each group to give the answer to that group's Question One, then have each group answer Question Two. (Point out that the answer to Question Two in Handout Two

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Ms. Focseneanu is a teacher of English in a public high school in Bucharest, Romania. She is President of the Romanian English Teachers Association and is part of a British Council-sponsored textbook project of writing interdisciplinary English coursebooks for grades 9-12.

completes that of Question Two in Handout One.)

6. Underline the idea expressed by the author of the article that the Great Wall is a symbol of sovereignty. Discuss and clarify the term "sovereignty." Ask for synonyms. Then ask questions such as: Does the animal or vegetal world accept this sovereignty? Do butterflies, squirrels, tree roots, clouds, ozone, etc. take the walls raised by the humans into consideration? Do walls stop them? Then ask if that means that birds, air and ocean currents, and tree roots consider no laws? Are there other kinds of unwritten, invisible laws? Can humans change these laws?
7. Write on the board or have transparencies with the following quotations from the article:

   "Our national boundaries are more like the skin on our bodies: permeable membranes through which life flows between our own existence and that of the rest of the world."

   "The Earth does not recognize sovereignty as we now know it."

   (If time allows read aloud from the Student Assignment and discuss the other quotes.)
8. Provide all students with the Student Assignment. Have them study the text at home and design a poster based on its main ideas. You may ask for group work and have six posters per class. Besides drawings or clippings, the posters may contain quotations on the theme. Ask the students to give a title to the poster. (You may also ask your students to create bookmarks.) Some suggestions for quotations to be used:

   "We are taught by great actions that the Universe is the property of every individual." (Emerson)

   "You are a child of the universe no less than the trees and the stars; you have a right to be here. And whether or not it is clear to you, no doubt the universe is unfolding as it should." (Desiderata)

   "It is only with the heart that one can understand things. What is essential is invisible to the eyes." (Antoine de Saint Exupery)

(continued on page 64)

Suggested Teaching Materials: Lesson One

1. Set of Pictures of Walls

- The inside walls of a house separating rooms
- A castle wall
- A zoo fence
- A prison wall
- A glass wall in a hospital
- A fence on an estate with a "no trespassing" sign
- The Berlin Wall before 1989/after 1989
- An image from the video clip for "The Wall"
- "All in all, we are just another brick in the wall" (Pink Floyd)

2. A picture of the Great Wall of China

Student Handout 1

Between the fifth and third centuries B.C., a series of walls were built in northern China by several warring kingdoms. The goal: to establish and protect their separate *sovereignties* and to ensure their security against *nomadic* invaders. Despite these walls, in 221 B.C. the armies of Qin Shi Huang were able to conquer the other six kingdoms, making Qin the first emperor of a united China. To *consolidate* his power and assert *imperial* sovereignty, Qin ordered that those portions of the walls dividing the kingdoms be demolished, and those running along the northern frontier be connected and extended in a new "Great Wall" more than 6,000 kilometers long. Over 300,000 men were *commandeered* for the ten-year project and forced to work under great hardship; many died in the process.

Qin's ultimate purpose was *immortality* through a *dynastic reign* that would continue in perpetuity. But this new dynasty was short-lived; only 15 years later, it was replaced by the Han dynasty. And today, few outside China know the name of the man who ordered the Great Wall.

Over the centuries, the wall fell into disrepair, a victim of the forces of nature. A number of rulers ordered it reconstructed or extended, but inevitably nature reclaimed it.

Vocabulary

sovereignties	(authority or dominion)
nomadic	(roving)
consolidate	(concentrate and combine)
imperial	(kingly)
commandeered	(seized)
immortality	(to live on after death)
dynastic reign	(rule by his family or descendants)
perpetuity	(forever)

Activity

After reading the text, answer the following:

1. Why was the Great Wall built?
2. Did the wall achieve the purpose for which it was built?
3. Explain the last words, ". . .but inevitably nature reclaimed it."

Student Handout 2

Today, although its remaining portions are maintained as a legacy of human achievement (it is one the few human-made structures visible from space), the Great Wall has no real significance other than as a symbol for the security and sovereignty of China. In fact, it is a testimony to the long-term failure and folly of the human quest for territorial sovereignty.

The wall is dwarfed by the mountain reaches on which it stands like a thin, nervous line. Life and power lie in the mountains, alive with a *myriad* of plant and animal species. *Microorganisms* turn stone to soil; insects, rodents and goats *traverse* the wall's ruins, nibbling plants that grow through the cracks, *oblivious* to the grand designs of humans. Trees on the slopes provide wood for fuel and homes; their roots hold soil and water against erosion and drought. Rain and melting snow flow in *rivulets* down the slopes, then *converge* in gushing rivers on their course toward lowland rice paddies which feed one billion people. China's security, now and in the future, depends ultimately on the *integral functioning* of the *dynamic* and *interactive* Earth processes.

Activity

After reading the text and going over the vocabulary with your teacher, answer the following:

1. What are the positive things one can say about the Great Wall? The negative?
2. How is nature reclaiming the Great Wall?
3. What, in your words, does this reading say?

Student Assignment

Read the following text, and design a poster based on the main ideas. Your poster may contain drawings, pictures from magazines, quotations on the theme, or any representation or imagery you may wish to use. Just be sure it represents the ideas from the article. Please give a title to the poster. The title should be the *main idea* or concept.

"A reexamination of sovereignty and security needs to be undertaken within the framework of these new understandings. If the Earth were flat it might be possible to prevent ecological threats from penetrating one's sovereign territory by putting up walls. But the Earth is not flat; it is round. It curves back on itself. And it rotates and revolves. Moreover, it is not a static, determinate system following a Newtonian model of mechanical equilibrium; nor is it comprised of separately acting, replaceable parts. It is a living, interactive system comprised of interactive subsystems, interactive species, and complex, dynamic, interactive processes.

"None of the Earth's various bio-regions are totally self-sustaining or sovereign. There is only one air system and one water system, on which the entire planet and its human and nonhuman subsystems depend. So toxic materials released in one region are carried across entire continents by air or water; the chlorofluorocarbons (CFCs) released in one country deplete the ozone layer upon which all depend, regardless of non-use of CFCs elsewhere; excess burning of fossil fuels in one country contributes to a global greenhouse effect threatening all countries. Claims of national sovereignty or immunity are useless against these threats.

"What is being said here, and what is underscored by most ecological threats, is that, in direct conflict with the prevailing concept of the absolute sovereignty of over 160 independently acting nation-states, *the sovereignty of the Earth is indivisible.*

"Like air and water, birds and animals cross political boundaries. Fish respect no exclusive economic zones or sovereign fishing rights. Pollutants dumped into the oceans find their way, concentrated in fish and shellfish, back to our dinner plates. In the sovereignty of the Earth, to touch one part is to touch the whole. The destruction of the Amazon rainforest—the "lungs of the world," producing one-fourth of the world's oxygen supply—threatens not only Amazonian communities, but all breathing creatures on Earth.

"What then does national sovereignty mean relative to ecological security? Who owns the rainforests? Who owns the ozone? Who can speak for Earth?

"No modern philosophy of sovereignty provides an adequate answer to such questions. Each has a fundamental flaw: the locus of sovereignty—be it king, parliament, or people—is perceived to lie solely with humans, and to be limited within territorial confines. The homocentric and territorial perception excludes the deeper sources of power and authority in the cosmic laws that govern the workings of the universe, the Earth and its biosphere. Humans are only beginning to understand these laws which they did not make, which govern all human as well as nonhuman existence, upon which all human survival depends, and to which all human sovereignties owe allegiance."

Procedures: Lesson Two

1. Display all of the posters and bookmarks.

   Announce that there will be a role-play of a selection committee that will choose three of the students' posters to be sent to an international exhibition entitled "The Global Environment." These three posters (plus bookmarks) will also be included in a book entitled "Our Planet."

   Selection committee roles are:
   - a teacher representative
   - a student representative
   - an ecologist
   - the editor of the book "Our Planet"
   - a member of the exhibition organizing team

   Before the roles are assigned, have the class discuss what each of these committee members would probably be looking for in a poster? What would their biases be?

   Assign roles. Also delegate six "guides" (one for each group, but not necessarily from each group) to explain to the committee in detail the meaning of posters as well as the reason(s) for the title choices.
2. The members of the committee should ask questions, debate, decide, then announce their decision and the reason for it. The rest of the class may also participate by voting, acting as reporters, etc.
3. Ask the students if they remember the last discussion about walls—walls "in space" and walls "in mind." What about walls "in time"? Do laws create walls in space and walls in mind? Point out that so far the discussions have referred to the past and present. What will happen in the future? Can laws build or tear down walls in the future? What kind of walls? What kind of laws?
4. Provide the students with Student Handout 3 and have them read. Ask: "What is a wall in time? What do we leave to the next generation? Have we the right to change the Earth's legacy as it has been left to us? What threatens the Earth today?" (Suggestions: toxic pollutants in water, air and soils; destruction of rainforests; the loss of topsoil; the spread of deserts; the loss of thousands of plants and animal species; etc.)

   Ask: "Who can legitimately make or change the rules or laws?" "Who or what is or acts as the ultimate arbiter in maintaining order or directing or influencing the public will?" After the students answer, show them Transparency #1 (see below); ask one of them to read it aloud.
5. "And such is the challenge to our creativity. . . . In helping the Earth to survive in its functioning and integrity, the present generation, thinking of the future... is there such a thing as developing an ecological responsibility?" If so, how? Is ecological sustainability a new cultural, social and political force? Should it be? Does each generation have the right to ecological sustainability?
6. Write on the board as the students brainstorm conclusions: What must be remembered, valued, taught and institutionalized?

   Examples:
   a. We must value all other forms of life.
   b. We must anticipate the effect of our activities.
   c. We must appreciate the future generations and their dependency on our choices.
   d. We must value and respect coexistence with other life forms, as well as other humans.
   e. We must educate to achieve the political will and the legal means to bring this about.
7. To assess: Ask the students to write their conclusions or create their own handout on "The Earth's Sovereignty," as if they were to teach it to a younger class.

Teaching Materials: Lesson Two

1. Transparency #1—(photo of the Earth taken from outer space; see page 53) For many, the photo of the Earth from outer space has become an icon. We need to take this process further and reawaken in ourselves a sense of our unity with—indeed, our identity with—the Earth. We need a transformation in world views, by which we come to see that the Earth is like a single cell in the universe; that the human is not over the cell, but a part of it; and that we will live or die as this single cell lives or dies.

   Shouldn't laws and our political institutions reflect this?

Student Handout 3

It is no longer possible to wall each other out or in. . . This assertion has to do not only with spatial relations across national boundaries, but also temporal relations: our interactions across time with those yet to come, who will be affected by our decisions. All living creatures have a strong instinct to ensure their own and their species' continuity. Qin envisioned his life continuing not only through his progeny, but also through his achievements—his choices, actions and politics in the present. But he was deluded into thinking a wall could ensure this. Today a grand failing among humans is not that we are only preoccupied with out continuity, but that we think about it too narrowly, in individual, territorial or time parameters that are too limited.

Unlike those tribal peoples who made decisions based on their effects on the seventh generation hence, we think only of the moment—or, at most, in terms of five-year plans. We have constructed mental walls between one generation and the next, between ourselves and our grandchildren, as if our choices, actions and policies had no bearing on their lives. We also give too little thought to our utter dependency, and that of our great-grandchildren, on the ongoing integrity of the Earth and its nonhuman as well as human species.

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Teaching Materials

Global Responses to Potential Climate Change: A Simulation.
This interdisciplinary, five-day unit provides students with an understanding of the issues in the debate on global climate change. Based on actual conferences, students play the roles of negotiators of ten nations representing the International Negotiating Committee for a Framework Convention on Climate Change. Available from Project Crossroads, 110 Vuelta Montuoso, Santa Fe, NM 87501, (505) 983-5428. Cost is $7.20 (duplication and postage)

Mertz, Gayle and Susan McLaughlin. *Environmental Law & Individual Liberties: Teachers' Guide.*
This guide combines lessons that address the tension between the need for regulation and law in the face of diminishing environmental quality and the individual's right to act and believe in ways that further threaten the environment. Available from Boulder County Safeguard Law-Related Education Program, P.O. Box 471, Boulder, CO 80306 (303) 441-3805.

Youngblood, Patricia J. *Shaping the Environment, Cases and Materials, Suggested Teaching Strategies.*
Prepared by the Law, Youth and Citizenship Program of the New York State Bar Association and the New York State Education Department and the Citizenship Law-Related Education Program for the Schools of Maryland, Inc. of the Maryland State Bar Association and the Maryland State Education Department. 1990. An invaluable resource that examines some of the landmark cases in environmental law such as the National Environmental Policy Act, the Clean Air and Water Pollution Acts. It also provides background information on environmental law, standing to sue, and examines the Constitution and environmental protection.

—*Mary Louise Williams*

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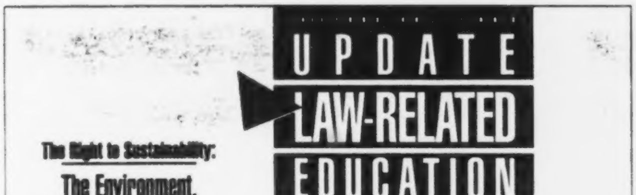

UPDATE
LAW-RELATED
EDUCATION
The Right to Sustainability:
The Environment,
the Citizen and the Law

Special Committee
on Youth Education
for Citizenship

American Bar Association

WINTER 1994 VOL 18 NO 1

UPDATE ON LAW-RELATED EDUCATION

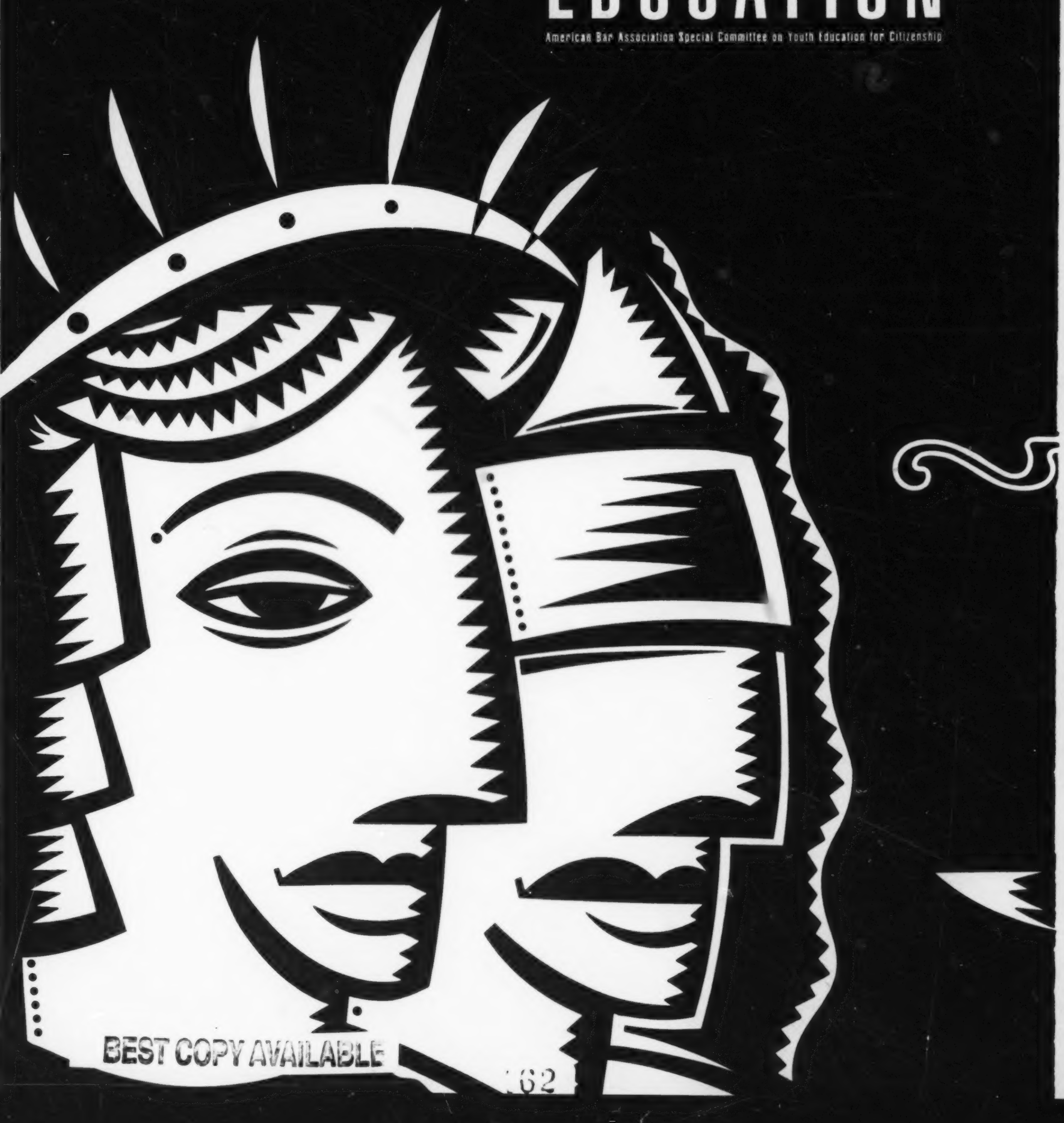
American Bar Association Special Committee on Youth Education for Citizenship

Special! Law Day Issue

Just Solutions

LRE Specialists Investigate Perspectives on Justice in Our Complex Society

PLUS TEACHING STRATEGIES That Focus on Justice Issues



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Law Day Issue

For LRE Teachers, Program Developers, and Resource People

What's Inside?

To Cicero, justice was "the crowning glory of the virtues." This year's Law Day issue is dedicated to this lofty, but elusive, concept. How do we define *justice?* Where do we seek it? How do we attain it? And why do we sometimes lose it? Our contributors searched for answers to these questions from inner-city Boston southwest to the Andean nations, and from Japan's crowded streets northeast to Alaska's remote Kenai Peninsula. Not surprisingly, injustice proved a more accommodating and persistent companion than its fragile counterpart.

This issue will argue that LRE educators can teach about justice in its own right, instead of relying only on injustice, inference, and empathy to foster the development of justice concepts. Strategies include special LRE tools that will show students how to arrive at fair decisions, with an eye to the complex needs of our increasingly multicultural society. Readers will have an opportunity to consider whether and how race, age, sex, and ethnicity influence perspectives on justice. And they will be inspired by an obstacle our Latin American colleagues are overcoming: teaching about justice where it is considered a foreign concept that doesn't work.

At the last turn of the century, social reformers like Jane Addams and Clarence Darrow were laying the foundation for the first juvenile justice system. Today, influential and respected critics of the system are seeking its abolition. See which side you and your students take in this issue's debate over whether to abolish the juvenile court. You'll also have the opportunity to compare our juvenile justice system to those of Canada, France, and Japan. And your students will be able to "make the call" in a case, patterned after a real one, where a troubled teenager's murder trial may be remanded to adult court. A look at what's new in LRE resources completes our Law Day issue.

The strategies in this issue are designed so that they can be adapted for classroom use on a single day or several days. Teachers will want to provide resource people with photocopies of materials beforehand and work out with them the best presentation formats and content for individual classes.

A special thanks to the LRE educators, editors, researchers, and reviewers listed below for helping us put together this exceptionally thought-provoking and informative Law Day issue.

Seva John —

Seva Johnson
Editorial Director
YEFC Publications

Contributing Writers

Kathy Bell
Joseph L. Calpin
Katherine Hunt Federle
Shelly Gordy
Joseph Jackson
Christopher C. Janku
Frank Kopecky
Susan B. LaGrone
Andra Makler
Gayle Mertz
Barbara Miller
Paula Nessel
Lynn Parisi
Ana Isabel Sanchez
Bruce D. Smith
Linda Spycher
David Keller Trevaskis
Alberto Wray

Front Cover Illustration by David Lee Csicsko

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DON'T MISS OUR SCHOOL LAW EDITION SCHEDULED FOR PUBLICATION THIS SPRING

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Washington, D.C.

Ann Blum
Carl Vinson Institute of Government
The University of Georgia
Athens, Georgia

Marshall Croddy
Constitutional Rights Foundation
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Phoenix, Arizona

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Sangamon State University
Center for Legal Studies
Springfield, Illinois

Michael H. Reggio
Oklahoma Bar Association
Oklahoma City, Oklahoma

Beverly Barr Vaughan
Law and Government Magnet
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Rochester, New York

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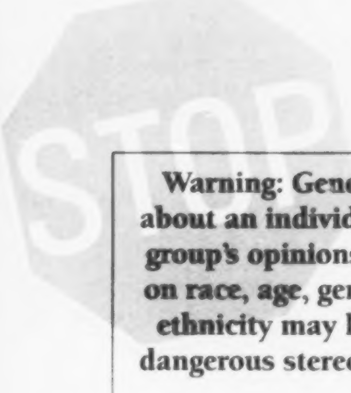
"Simple Justice"

Multicultural perspectives on an elusive concept

Gayle Mertz



Warning: Generalizing about an individual's or group's opinions based on race, age, gender, or ethnicity may lead to dangerous stereotyping.

The warning above, just as those on cigarette labels, may seem obvious and unnecessary. Yet, we know that millions of people continue to smoke despite their knowledge of the risk. I feel compelled to add this warning because I know that our behavior does not always reflect our knowledge and because I feel uncomfortable classifying people as I sometimes have in this article.

As I interviewed people, I repeatedly prefaced my questions with an apology for generalizing about the race, age, gender, or ethnicity of the student groups that we were discussing. I tried to resist framing questions based on my assumptions about the demographics of the community where a teacher taught, or a student went to school. While we were all keenly aware of stereotyping or generalizing dangers, answers to my questions were regularly preceded by the statement: "I don't want to generalize, but— ." My issuing this warning is not an attempt to criticize but to break a habit, reflect a "just" approach in delivering law-related education, and develop a solid foundation for the study.

D*ynamic* is the word that comes to mind when I analyze my attempt to guide educators and students in exploring concepts of justice and culture and their interplay. This word is exciting: it speaks of energy and power . . . movement. For some, it can be unsettling, denoting instability, change, or an explosion. As we spoke, I was aware of what will sound like a contradiction. Responses were enthusiastic; yet, at the same time, they revealed caution and concern.

I knew that I was on shaky ground when I set out to explore cultural variations in how students perceive justice and how teachers teach about the topic. As I interviewed, I slid and shifted in my attempt to find solid ground upon which to construct this article. I had already begun to address this problem by selecting a group of well-seasoned, creative, dedicated educators who teach in multi-ethnic settings in diverse communities. These teachers are aware of cultural variables and incorporate that knowledge into their teaching. Further, without exception, their sensitivity to their students' backgrounds and concern for their welfare appeared to extend beyond traditional classroom responsibilities.

Initially, I asked the teachers about the racial and ethnic cultures that their students represented. Those classifications, however, were inadequate, as teachers focused more often on the cultures of privilege or poverty and, perhaps most important, on the culture of youth. Conversely, when I talked to students, they leaned toward classifications based on perceived authority, power, and abuse of that power.

Describing Justice

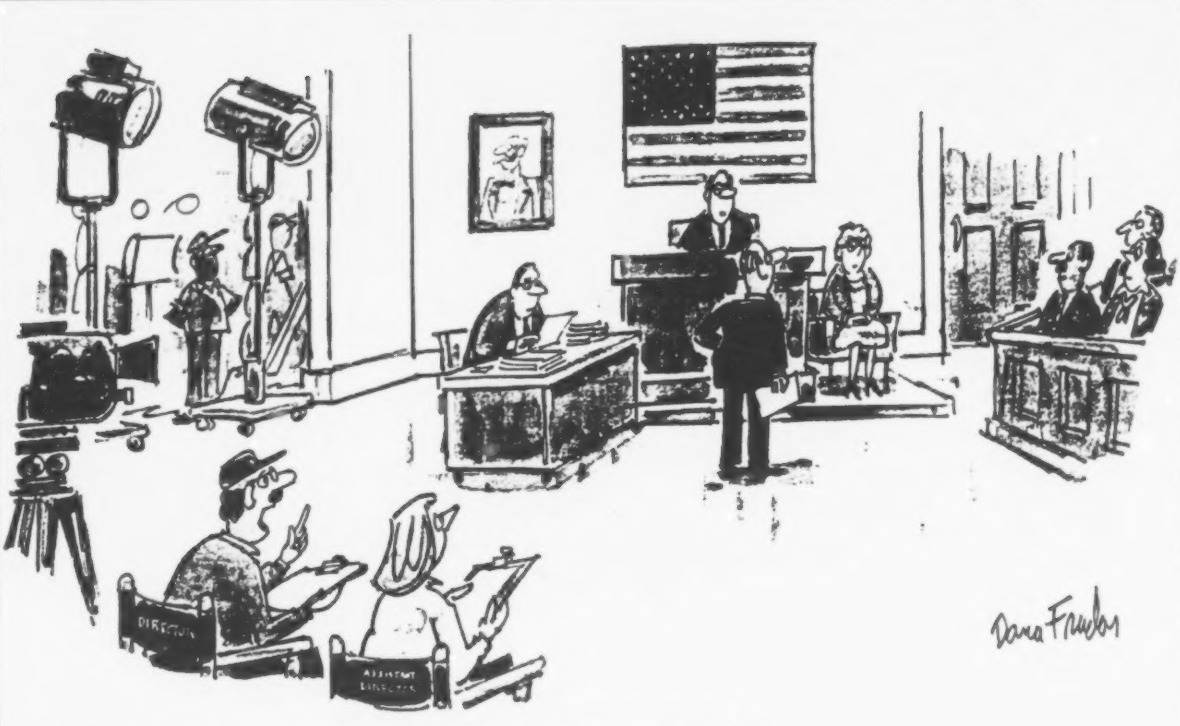
St. Augustine is remembered for his comment that, when asked what time was, it was something that he understood; but, when asked to describe time, he did not know what it was. The educators that I spoke to were wholly familiar with the concept of "justice," and they were sensitive to "cultural variability"; yet, like St. Augustine, they struggled to describe these familiar terms. As you will see below, our process of exploring their meaning and interplay provided rich food for thought.

. . . As Fairness

In 1959, Supreme Court Justice Potter Stewart told *Time* magazine that "Fairness is what justice really is." *Fairness* is the single word that I heard most frequently as I asked this diverse group of teachers and students to define *justice*. Yet, more often than not, when I asked them to describe it, they focused on the absence of justice or the presence of injustice. If fairness is the cornerstone of justice, it does not appear to be solid.

Teachers and students alike agreed that youth today are growing up in an unjust world. Many teachers shared

Gayle Mertz is the director of the Safeguard Law-Related Education Program in Boulder, Colorado.



"*Lights! Camera! Justice!*"

Drawing by Dana Fradon; ©1992 The New Yorker Magazine, Inc.

with me their keen awareness of the threatening environment that children live in and the low expectation that young people have of being treated justly. Predictably, the nature and scope of this injustice is perceived and documented in many different ways. Whether subtle or overt, it contributes to an environment of oppression and distrust.

> We have a very, very active sports program and get a tremendous amount of recognition for that—both girls and boys. They sometimes will get into the issue of the fact that there's a Coke machine in the boy's locker room, but not a Coke machine in the girls' locker room. Big issues such as sexual harassment we haven't really addressed.
>
> —Carol Swanson

> [H]ow come we are asking these kids, living in these kinds of situations, to come to school and learn, when they are thinking about how I'm going to dodge a bullet to get back home?
>
> —Keith Bennett

. . . As Institutional and Personal

When speaking for themselves, teachers tended to voice concerns about social justice and policy issues. Yet, when questioned about justice-related issues that are of greatest concern to their students, they cited personal issues. Students followed suit in expressing their frustration with inequities that appear to be a routine part of their lives. I did not hear any whining. Students' concerns were real, they were legitimate, and, if anything, in my opinion, they were understated.

> I have a teacher that's really sexist, and he just takes everything as a joke. I told him—I keep telling him—those are sexist comments and stuff, but he just thinks it's a joke.
>
> —Hermine Ngnomire

> I teach in a neighborhood that is kind of rough; it's tough for students to even stay for after-school activities . . . because the parents don't want them walking home in the neighborhood or even going to the bus stop to wait for the public bus.
>
> —Molly Schmidt

> It depends on what kind of baggage students bring with them. What kinds of issues they are dealing with in their lives. Obviously, if you're worrying about where you're going to be living versus some injustice that they see but don't really have to deal with . . . they're going to prioritize things like that.
>
> —Linda Raemaker

Respondents frequently pointed to "the system" as the source of injustice. They used this amorphous term to broadly describe government, school administration, law enforcement, the courts, or, simply, some generalized obstacle that could not be changed. Teachers told me stories that documented their frustration with the inefficiency and inequality they consider inherent to the system.

. . . As Popularized Ideal

When I pressed for a definition of justice, as opposed to *injustice*, educators and students alike struggled, paused, and then used popularized words and phrases that symbolize the patriotic ideals upon which this nation was formed—ideals articulated in famous documents such as the Declaration of Independence, Bill of Rights, and the civil rights acts. Interestingly, the terms are some of the high-interest components of a comprehensive LRE curriculum: *victim rights, equality, due process, civil rights, sexism, racism, gangs, equal opportunity, discrimination, prison, rules, harmony, violence, safety, freedom.*

Just Us

> I think that we confuse freedom with justice in this country because freedom is such a big thing that everyone thinks that we are in this country, so we are free, and so that means that there is justice . . . our community is a very restricted culture. There are a lot of cultural taboos . . . restrictions and limitations on the role of individuals and families . . . in the wider community, our young people have different roles. We are confused about what freedom is and what justice is.
>
> —Kaying Yang

> Do I think they're more concerned about those bigger global issues than their own personal issues? No, because they don't bump up against those as much. I think that they can be brought to a point where they do care about those more than they would have if you never presented the issues to them . . . trying to provide kids that age with an opportunity to see a situation from another person's perspective is really important because they don't ordinarily do that on their own.
>
> —Molly Schmidt

Teachers recognize that students' specific concerns are more directly related to their personal experience or that of their family or peer group. Fairness and opportunity at school, and trust and safety on the streets, were dominant themes. My interviews led me to believe that students who experience fairness at home, at school, and on the streets are better able to extend their interest in justice issues to concerns of another individual or to global social issues. Young people appear to broaden their concept of justice as they expand the scope of their social experiences.

It appears that students living in affluent communities enjoy the luxury of addressing social justice issues that do not affect them directly. Personal comfort, safety, and sophisticated resources in well-funded schools often set the scene for social action and inquiry on a global plane. In many cases, this is an academic pursuit that ends with the semester, while those students who live in a culture of injustice or inequality cannot close the book on that topic.

A troubling observation is that many young people who experience injustice first hand are not able to extend their concern to the plight of dissimilar individuals or groups. This is demonstrated by a frequent occurrence (not unlike that in the greater society) where a narrowly defined group of students or young people protest against an inequity to which they have fallen victim.

Beyond Webster

A rose by any other name would smell as sweet. The concept of justice is not so universally, or uniformly, recognized as the aroma of a rose. People raised in the United States have a difficult time defining justice. Looking up the word in the dictionary simply leads to a culturally and experientially biased definition. People whose first language is not English, and whose first culture is other than mainstream U.S.A., often cannot translate this word.

The Hmong have no word for justice. Many other people use it to refer to a dictator's reign or a religious leader's prophecies. Without a common information baseline, many students enter the LRE classroom with a serious but not always obvious or recognizable handicap.

The word *justice* is ever present in our popular culture. It is used commercially, in rap music and television show titles. When I asked a recently arrived Asian teenager what justice was, he told me that it was the name of a baseball player. He was right. Yet, this knowledge did not prepare him to contribute to a discussion in his government class.

Cultural Empathy

Our culture reflects something that we do comfortably or naturally. It is the way that the people closest to us usually communicate, worship, eat, play, or address conflict. We just do it that way. We always have. When we observe people operating differently than our friends and family we observe that their culture is unusual. As I conducted interviews, my awareness of this phenomenon increased. It's not surprising that the offered definitions of justice, or injustice, emanated from the individuals' sense of identity and their perceptions of the identity of those with whom they do not share common ground. In some cases, primary peer groups were linked by race or ethnicity; in others, their bond was formed by participation in school activities, their grade level, or the proximity of their homes. I expected to unveil more frequent bonding along racial or ethnic lines. One of the values of this project is that it forced me to reconsider some of my preconceived notions.

In this small sample, I found that, when students and teachers were members of the same or similar cultures, there was a sense of trust and comfort that was not so evident when the teacher represented a culture different from that of the students. There appeared to be a subtle understanding of unspoken norms and an empathy for the situations students sometimes find themselves in.

Interviewees

Note: A number of respondents in this survey work or attend classes at Boulder High School in Boulder, Colorado. This grade 9-12 school is in a predominantly white middle-class community, where students are 50-75 percent Anglo, with the rest African American, Hispanic, and Asian American.

Keith Bennett teaches social studies at East Boston High School in Boston, Massachusetts. The students in this school's inner-city, low socioeconomic community are about 90 percent African American with some Asians and Hispanics. Keith is originally from the Caribbean.

Melvin Garrison teaches museum education at a national historical park in Philadelphia, Pennsylvania. His K-12 classes include social studies and American history. The students are predominantly African American but also include Vietnamese children and Hispanics from Puerto Rico and Central and South America.

Donna Lester is secondary coordinator for the Boulder Valley School District English as a Second Language program in Boulder, Colorado. Her students are 55 percent Hispanics from Guatemala, El Salvador, Mexico, and Venezuela, as well as refugees from Asia, including Cambodians, Hmongs, and Vietnamese.

Hermine Ngnomire is a young black attending school at Boulder High School in Boulder, Colorado.

Linda Raemaker teaches about 150 miles south of Anchorage, Alaska, at Skyview High School in the Kenai Peninsula School District. Serving a number of outlying areas, the school has about 550 students, mostly white middle class with some Alaska natives and other Native American students.

Linda Rhodes teaches at Taylor Middle School in Albuquerque, New Mexico. The school's students come from highly diverse backgrounds and include mostly Hispanics and Anglos, with very few African Americans. Recent transfers from the East Coast (New York State, Connecticut, Maine, and Massachusetts) are from middle to high economic areas, while other students are from very poor ones. Academic ability ranges from behavior disordered to academically exceptionally gifted.

Alma Rojan is an ESL student in Boulder, Colorado. She has spent most of her life in Texas, having moved to Boulder four years ago.

Ryo Shinshi has been a visiting Japanese student at Boulder High School in Boulder, Colorado, for about a year.

Molly Schmidt teaches at Clark Junior High School in a low-income area of Anchorage, Alaska. Her students represent quite an ethnic mix: a large number of Alaska natives and African Americans; Asians from Vietnam, Korea, Japan, and the Philippines; Mexican Americans; and Caucasians, who are a school minority.

Carol Swanson is a special needs teacher at North Quincy High School in Quincy, Massachusetts, where the approximately 1,160 students are primarily Caucasian but with a substantial number of Asians and Southeast Asians, as well as a small number of African Americans and Hispanics.

Thu Le, a Boulder High School student in Boulder, Colorado, is a Vietnamese who came to the United States in 1992. She participates in the school's English as a Second Language program.

deana harragarra waters, a member of the Kiowa and Otto tribes, teaches the Indian studies component of the year-round American Indian Upward Bound program at the University of Colorado. The program serves students in grades 9-12, bringing them to the university to develop study habits and an idea of what college life is like. The students are 75-80 percent Native American, with the rest Hispanic and Anglo. deana is also an attorney with the Native American Rights Fund and has served as tribal judge for the Otto Tribal Court.

Kaying Yang, a Hmong, until recently was a liaison between a mental health agency and schools. She worked with Asian junior high and high school students in Colorado, facilitating school support group meetings where students discussed issues related to their adjustment to living in a new culture. Kaying's students came from Southeast and East Asia including Japan, China, Korea, Laos, Cambodia, Vietnam, and Thailand.

When I ask my second-year students to do a presentation on their family or something that is unique to their tribe or their family, or tell about a person's life, or whatever, you have to remember there are restrictions on how much you should tell or how much you should say; and I think because they believe in these restrictions, I never try to invade; and I always say if it's not something you're comfortable with, we'll do something else. . . . I don't invade that part of what makes them uniquely who they are or who they come from. . . . It's not easy sometimes being Indian because there are a lot

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> of things that others just don't understand. Maybe they're not supposed to understand it; I don't know.
>
> —deana harragarra waters

> Asian-American teenagers . . . feel that everyone's unfair to them. . . . [W]e're like a sandwich . . . we're the meat, and the American side is the bread, and their culture is the other bread . . . so they're stuck in the middle. And, so, Asian-American teenagers feel that people are unfair to them. . . . Part of my job is to make them feel like they are part of this culture and that they are not outsiders. It's very hard to convince them that they are equals, that they are Americans. Even for myself, it's hard . . . to admit that I don't want to be American.
>
> —Kaying Yang

Age and Economics

While empathy can stem from a common cultural background, teachers were quick to recognize age and economic similarities as shaping students' perceptions of injustice, and to correct my suggestion that race or ethnicity was a dominant influence. Following is one teacher's response when I asked whether students would define justice differently based on their ethnicity, race, or socioeconomic level.

> I would say not so much on their race or their ethnic background; I'd say more based on their economic situation. Although, we got in a discussion just yesterday in class, where a collection of kids, some little . . . Alaska native girls and some kids in the class who are African American. . . . typical junior high kids; they aren't kids who get in trouble. They were telling me about how they've been harassed when they go over to this mall that is near our school . . . it's because they're kids that they are discriminated against, because they were talking about how kids get picked on and kids don't get treated as fairly as adults would.
>
> —Molly Schmidt

Just as students are most comfortable within their own culture and can best explain their experiences in its context, many teachers draw on their cultures, upbringings, and experiences in defining the elusive term of *justice*. I felt that the more candid they were in telling their stories, the greater empathy they exhibited in retelling those of their students.

> I had a short visit to the South in the sixties. It lasted one day . . . it's a long story . . . it involved a northern boy, a northern black boy, visiting relatives in South Carolina about 1963, and I posed questions . . . that at that time rocked the status quo or created an unfair situation. . . . So, they sent me home. And it was summer vacation, and I was sent back home to Philadelphia because I didn't fit in. . . . It had an impact on me. . . . The rights of individuals are very important to me . . . I talk a lot about it.
>
> —Melvin Garrison

Gia Dinh, Kazoku, Familia

These terms may not be familiar to you, and that may make you uncomfortable. Yet, they represent comfort and familiarity to the three students quoted below, who use them to say "family." When I spoke to students who were not raised in an English-speaking U.S. culture, it was clear that their families played the primary role in defining what is just and how conflict should be addressed. Certainly, family norms and values always play a primary role in shaping children's world views; but I focus on these students because it is evident that children who live in somewhat isolated minority communities rely more on the norms they learn there than those who move more freely among our multicultural communities.

> If my parents do something that hurts me, I go to my relatives and tell them what I think, and they will help me and talk to my parents about that. In Vietnam, we think about the love between our relatives. But, in this country . . . if students are mad at their parents, they just go away . . . or do something else; they don't care about their parents.
>
> —Thu Le

> In America, people like to talk about these kinds of things, like what's right or what's wrong. In Japan, we don't talk about it. I think everybody knows. Their parents have to teach them—their family. They are not supposed to talk about it in school, I think.
>
> —Ryo Shinshi

> [Justice]—I would say it's what the president says . . . and other people who make up the justice system. In my family, my dad . . . I would consider him the president. He makes up the rules. He judges what is wrong and he decides the punishment.
>
> —Alma Rojan

How might Native Americans resolve issues related to fairness in their families or at school? How might they handle a situation where someone took what belonged to someone else?

> Sometimes [resolving fairness issues] might be as simple as "Well, Grandma decides what happens and then you abide by that." I think that is universal in a lot of families, not just Indians. . . . [Taking someone's belongings] might be handled differently because sometimes things at home might not just be yours; they are everybody's. You may be the one who wears it the most, but maybe somebody else can wear it, too, because they need it. There is a tremendous amount of sharing that goes on. In school, Indian students are beginning to learn about materialism and about ownership of possessions. This is different from the home environment.
>
> . . . If there is something wrong or done wrong to Indian students in school that they might feel is unfair, they might not speak up about it simply because they have the security or the strength of

> home life. So, it doesn't matter what happens at school; what matters is the sense that things are OK at home. To me, that marks what it's like to be an Indian, and it might be that way for other cultures too.
>
> —deana harragarra waters

Popular Law

The U.S. legal system is more open and public than most of the formal and informal decision-making bodies of its subcultures, and the system sharply contrasts with practice in many other nations. Thu Le, Ryo Shinshi, and Alma Rojan represent the first generation in their families who will have almost unlimited opportunity to participate in civic justice. Our popular culture provides them and all our society with a framework for social and cultural interpretations of justice, one that consists of significantly influential misinformation as well as fact. I believe that our popular culture and legal system's openness are primary sources of the confusion about justice that was apparent in my interviews.

> [T]hey think that their culture is limiting them and want to be close to American culture, whatever that perception may be. Like a couple who fight and call the police—they think that the police are going to help them . . . they find out that the police get them in more trouble because they are reported to social services . . . they call 911 and get help at that moment and then, eventually, one of the family members gets a ticket and must go to court, and it drags on and on . . . causes more trouble. . . . [A]gencies should function as mediators, not as people who ticket and give citations . . . [Asian Americans] don't see laws in this country as justice, and it doesn't protect them.
>
> —Kaying Yang

Thanks to this study's timing and TV coverage, almost all the respondents talked about the Rodney King and Reginald Denny trials—an ongoing source of discussion and debate in schools across the nation. I have noted that students and teachers associate with victims and identify cases by victims' names.

> We are taught to believe and trust in policemen. And that policemen act fair. Here you see policemen who visibly acted unfair. One kid put it very clearly: how can you trust a policeman if you get in a situation and you have to talk to them. . . . Because he may act like these policemen did on TV.
>
> —Melvin Garrison

While most of us learn about justice, or the justice system, through popular culture, its lessons take many forms of varying educational quality. Your friend's brother-in-law's neighbor testified at a trial and is now a legitimate information source about the justice system; or you have watched a special made-for-television, "almost real" theatrical reenactment of a sociocultural legal drama. Even better, you watch Court TV. The media do not focus on broad legal concepts but on sexy, high-profile drama that happens to involve a courtroom scene or two. Charles Rosenberg, a partner with Rosenberg & Chittum and a legal adviser to *L.A. Law*, recently defended that show's role in educating people about law and justice. Responding to a *Yale Law Journal* article, he stated that the show is not about lawyers, but about drama. "Certainly there is some [law]. From my perspective as an 'insider,' however, the show is less a conscious attempt by the writers to influence how people feel about the law or lawyers than it is an effort to create interesting drama, with law as its stage. The writers see *L.A. Law* primarily as a drama about interesting people, some of whom happen to be lawyers." Young people that I spoke with, however, view *L.A. Law* and similar television shows and movies as realistic representations of the glamours and fast-paced lives of attorneys, police officers, and judges.

In many ways, ordinary people in the United States are able to participate in the administration of justice, and they have the freedom to influence policymakers in this arena. Officeholders and candidates play to the mood of their voting constituencies in developing platforms on justice issues. Citizen juries offer an opportunity for personal participation, and people serve on a variety of committees and commissions, and on parole boards. CNN and C-SPAN bring our government's formal operations into our living rooms.

Popular culture is readily accessible, with high-tech media that grab and hold our interest. It is often multicultural and multilingual (user friendly), and it focuses on high-profile justice issues. However, the present survey only convinced me more deeply that, despite its entertainment value, popular culture is an unsound vehicle for legal education. It is narrow in scope and often focuses exclusively on the sensational. There is no rap music about water law, and there are no made-for-television specials about consumer rights.

Justice at School

Most educators that I spoke to felt that student trust and respect are based on the degree of trust and respect that their school setting afforded them. Students are quick to label one teacher as fair and that teacher's colleague as unfair, or to recognize that an administrator's "fairness" might compensate for its lack in another teacher. The students that I spoke to based their assessment on individual behavior and were sophisticated enough not to generalize about entire faculties or administrations. To their credit, young people I talked to while they were being detained in a juvenile detention facility were philosophical and defined justice or injustice in global rather than personal terms. They did not accuse the system of being unjust.

While most educators thought that students' assessments of a teacher's fairness were based on that teachers' individual behavior, some teachers did feel that their own race or ethnicity disadvantaged them.

We've had a situation just recently with this one Hispanic boy that I feel is biased against me because my skin is white, and he is a little bit more lenient, or patient, in his remarks toward the other teacher because she is part Hispanic and she speaks Spanish to him periodically. . . . I don't think that she patronized him . . . because out of the team of the three of us, she is the firmest disciplinarian.

—Linda Rhodes

I do try and tell [students] about my background . . . as an encouragement to them. But, you know, some of them still have an American philosophy about foreigners . . . I can say this because I am black—most black Americans don't trust foreign blacks. . . . I don't talk their slang. I don't dress like them. . . . I would say that more white kids have more confidence and listen to me and are friendlier than black kids.

—Keith Bennett

Justice and the Predictable

Teachers told me it is much easier and more relevant to associate justice-related issues to students' personal lives than to textbook lessons. Personal experience is what students everywhere want to talk about, both formally and informally. Teachers agreed that justice is not equal in the home, in the school, or on the streets. They did not agree, however, on which environment affords students the highest level of justice. It quickly became clear that students equate justice with an environment in which they know what to expect and exactly what the rules are. Even when they described predictable situations that were clearly unjust to me, students often seemed to be more comfortable with them. Predictability was sometimes tied to culture, sometimes to experience, and sometimes to knowing exactly what the rules or laws were that governed them.

At home, I learned rights and wrongs, and I have to deal with it. I learn how to keep my promises, how to keep my curfew, and how to keep my room clean. In school, I already know that stuff, and I just have to put it to work. I know what the consequences are going to be if I don't do my homework.

There are different lessons that you learn on the streets about justice. I remember, one year, I saw a guy—I guess they were just looking to bust people—and he dropped a gum wrapper on the street. They fined him $15. That was really unnecessary. They could have asked him to pick up the gum wrapper or something like that. Certain things aren't OK on the street. You can't look at certain people in certain ways. You can't be wearing certain colors. You can't have a pager because everybody will assume that you are a drug dealer. There is just such stereotyping on the streets.

—Hermine Ngnomire

[T]hey don't always see justice portrayed either at home or in the news media. They see what we would not consider justice. They don't see fairness, so I think the first contact with a fair system . . . comes in the classroom.

—Melvin Garrison

Spiritual and Supernatural Justice

I know about Indian belief systems where there are people who do and can practice certain types of medicine, whether it's good medicine or bad, and so you could go to people and ask for what you believe to be just and what somebody else might believe to be a bad thing to happen to somebody.

—deana harragarra waters

While a reliance on spiritual or supernatural dimensions of justice is not often directly spoken of, it is often alluded to. Whether in the form of individual or group prayer, ritual, magic, or healing ceremonies, spirituality is an integral part of many people's understanding of justice. Both youth and adults turn to their faith or belief systems to help them understand or remedy injustice. Meetings, marches, and rallies for social justice often involve clergy, prayer, candlelight vigils, and hymns. Young people often cite their participation in these forums as a meaningful and effective process in achieving justice.

Justice Now?

A common stereotype of teenagers is that they like quick action and immediate gratification. I wondered if this would hold true when they thought about this lofty concept of justice. In a temporal sense, attitudes and theories about justice vary widely. They are based on cultural norms, religious philosophy, legal interpretations, and political motivations. There is an old Jewish folk saying that justice delayed is worse than injustice. Robert Kennedy said that justice delayed is democracy denied. Richard Nixon said that justice delayed is not only justice denied—it is also justice circumvented, justice mocked, and the system of justice undermined. I found that teachers and students often referred to more patient role-models, recognizing that the road to justice is often a long one with many roadblocks, detours, and speed limits. Martin Luther King, Jr., acknowledged this in his famous "I Have a Dream" speech at the 1963 civil rights march in Washington, D.C.: "I have a dream that one day on the red hills of Georgia, the sons of former slaves and the sons of former slave owners will be able to sit down together at the table of brotherhood . . . I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."

I questioned teachers about students' temporal perspectives on justice. Do they seek speedy justice or believe that "what goes around, comes around"? Teachers confirmed both extremes, with individual perspectives often being an extension of cultural training and background.

I think that teenagers generally want action immediately. How well they express that obviously depends on how long they've been here, how much their parents are pushing for that kind of thing, and how involved the parents are. I think that's real hard to get at because, when we're talking about students who have limited ability to express themselves in English, plus they question how much they want to open up to a foreigner . . . it is really hard to get a sense of . . . how much things are bothering them.

—Donna Lester

Indians are very patient people in terms of willingness to wait a long time to do something or to take action. I don't think it's because there is a laziness about it . . . there is a right time for doing things—there's a right time for deciding. And it's unfortunate because we live in a society that is run by the clock. . . . I do believe that everyone does feel that it will take care of itself in time.

—deana harragarra waters

Three Justice Lessons

Sometimes, a person has to speak up for children . . . to clearly take on the voice of a child. Is it cultural? . . . I don't know. I can say that, in many situations, the voice of the children has come from other sources . . . who have observed unfair situations . . . because many of these children don't know that they're being treated unfairly.

—Melvin Garrison

Teachers named three ways that students learn about justice at school. The most often mentioned has already been discussed: the way that a teacher or other school personnel treat individual students. Teacher role-models appear to have the greatest influence on whether a student expects to be treated justly in the community beyond the family. Second, they look at the school's policies and procedures for settling disputes, investigating violations, and meting out punishment or consequences. Finally, LRE education is the curricular approach to teaching about justice. Each teacher I spoke to uses LRE strategies and resource materials to address issues relating to our formal and informal systems of achieving justice, and to help students understand what we mean by the term.

We always give the kids all of their grades, and they can challenge us on any of them, so that they know why they got what they got; and I think that is real justice in itself. Oftentimes, kids have no idea why they got the grades they got or what kinds of evaluation they got. We're an open book, particularly with my little computer . . . they get printouts whenever they want.

—Linda Rhodes

I'm not sure how other students feel, but a lot of [Asian] students have told me that they are embarrassed when they are confronted in the classroom; so it makes them refuse to come back to class . . . I think that is why we have a high dropout rate. . . . I tell them that it's normal that the teachers confront them about their work and that they should confront the teachers first and explain their problem. . . . I think that Asian students need to know that it is OK to do that, and not to see the teacher as someone who is just a scary person who gives you homework.

—Kaying Yang

We do mock trials. In fact, we've just finished one. I think it was really good because the students that participated on every level realized that it's not as black and white as they thought. . . . [A] number of the juries couldn't reach a verdict, and they expected to.

—Linda Raemaker

Teachers shared ways that they clarified misconceptions and used multicultural perspectives to teach about justice.

[Youngsters] believe that the Liberty Bell and the Declaration of Independence go hand in hand. . . . However, when I talk about the Liberty Bell, I point out that [it] got its name by being chosen as a symbol of the abolitionist group that spoke out for the rights of the African Americans. They spoke out against slavery; so, therefore, they chose this bell and the slogan on the bell stands for the rights of a people being denied.

—Melvin Garrison

I use one exercise of the Navajo concept of justice . . . a man was murdered. And, in the American justice system, you look for punishment, and then you . . . put that person in jail. . . . That is the form of justice that modern society has. Whereas, . . . the Navajo in the same circumstance would call the families who were involved together and look at the worth of the man who was taken from them. They would try to find a way to compensate . . . for that person's absence or loss. . . . There is a way of trying to make up, or to repay, . . . so there is not that concept of punishment. When I present this to the students, I'm always impressed, or, I guess, astonished, that they don't think it's right to put the person in jail. That tells me that they're still exploring . . . they hear a lot about how the punishment must fit the crime . . . but they are still looking at trying to make things right or whole.

—deana harragarra waters

I would like my students to do a comparative study of their culture and others . . . compare these words [*justice, freedom*], which are so powerful in this country . . . I don't think that you can really appreciate your own culture until you learn about someone else's culture, and then you compare what justice and freedom mean . . . and how they are different.

—Kaying Yang

There is one thing that all the teachers agreed upon—that LRE is relevant, challenging, and empowering, perhaps most enthusiastically voiced by Molly Schmidt.

(continued on page 49)

When Values Conflict: The Court, the Law, and Individual Freedom

Barbara Miller and Lynn Parisi

Background

In this lesson, students will have the opportunity to consider to what extent a person's cultural orientation may be used as a mitigating circumstance in determining punishment when a law has been broken. In the United States, where there is a wider mix of religions, languages, races, and cultures than in many other nations, courts must often try cases where an individual's cultural practices conflict with the law. This lesson will help students recognize some of the points of tension between two important American values involved in this conflict, and how court solutions have addressed them in specific cases.

The first value involves our concept of individual freedom—for example, ideally, individuals should be able to freely follow their cultural practices. The second value involves the principal of law and ordered liberty; that is, another way of looking at these issues is that certain human rights and principles of conduct transcend all cultures and demand protection, regardless of the traditions of a people who are unacquainted with or do not adhere to them.

Resource Person's Note

This lesson can be accomplished in one day and will complement discussion of how the court arrives at just solutions, particularly when a case has strong mitigating circumstances. The material will be especially useful for enrichment when classes have already studied or are beginning to discuss the Bill of Rights and/or the Universal Declaration of Human Rights.

Objectives

At the end of this lesson, students will be able to:

1. Analyze cultural practices from the perspective of some U.S. laws.
2. Describe some cultural practices of immigrant citizens and Native Americans that conflict with certain laws.
3. Debate the degree to which our legal and judicial systems can and should bend to allow for differing cultural practices and still be effective for society as a whole.

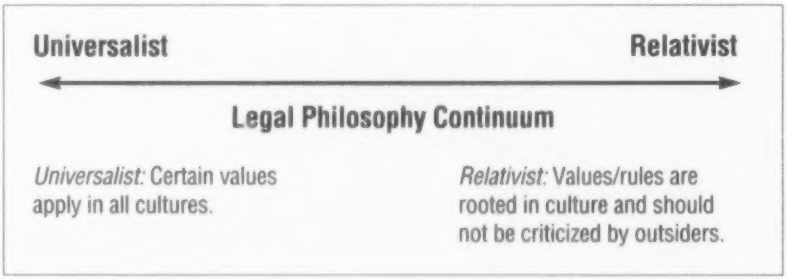
Time: 1 class period

Materials: Copies of the handout for all students

Procedure

1. Explain that this lesson will address a question in legal philosophy: that of how tolerant our legal system should be of immigrants' and indigenous peoples' cultural practices when cultural notions of justice conflict with existing laws.
2. Draw the continuum on the board. Define the terms *universalist* and *relativist*. Ask students which position best represents their view of the relationship between cultural values and the law. If a culture does not share the values that underlie a law, should its members be excused from the consequences of breaking that law? On the other hand, do certain values transcend culture, being so basic as to apply everywhere regardless of tradition and to demand that the laws designed to uphold them be followed to the letter, or else? Where do individual students fall on the continuum?
3. To help students consider this philosophical question more concretely, pose some possible cultural practices that are accepted in other countries, such as:
    - Parents select whom their children will marry.
    - Some people must work against their will without pay.
    - Newborn girl children are killed during times of famine.
    - One man may have several wives.

    Have students place themselves on the continuum based on their answers.
4. Provide each student with the handout, and explain that they will have an opportunity to test their philosophical position through analysis of a specific case involving a conflict between existing laws and cultural practices. Divide the class into seven groups, and assign each group one of the cases (there are two in case 7, both involving the religious practices of Native



Legal Philosophy Continuum

Universalist: Certain values apply in all cultures.

Relativist: Values/rules are rooted in culture and should not be criticized by outsiders.

Americans). Each group will discuss the case and present a decision and the reasoning behind it to the rest of the class. If the group cannot, have them explain why they couldn't agree.

5. As each decision is presented, share the court resolution and reasoning. How do these compare with the students' decisions? What do the resolutions say about the way our courts work?
6. To conclude the lesson, have students reconsider their position on the legal philosophy continuum. Has this exercise caused them to reevaluate how law and culture should interact?

Adapted from Teaching About Law and Cultures: Japan, Southeast Asia (Hmong), and Mexico *by Barbara Miller and Lynn Parisi (Boulder, Colo.: Social Science Education Consortium, 1992).*

The powerful drug mescaline comes from the peyote cactus's "button" top. U.S. federal law prohibits mescaline's use except by the Native American Church, which has traditionally included the plant as a sacrament in religious ceremonies. The effects of a 350-microgram mescaline capsule last about 12 hours and resemble those of LSD, with users seeing beautiful color patterns or frightening visions of themselves and others as monsters. Regular users may become unproductive and disinterested in life. In most cases, these reactions end after a person stops taking the drug.

Universal Declaration of Human Rights

Adopted by the U.N. General Assembly in 1948, this declaration identifies basic civil, economic, political, and social rights and freedoms of every individual. Meant to serve "as a common standard of achievement for all peoples and all nations," it recognizes that every person is born free, with inherent dignity and inalienable rights. For example, Article 18 declares that everyone has the right to freedom of thought, conscience, and religion, while Article 25 says that motherhood and childhood are entitled to special care and assistance. If you wish, start this lesson by asking your students if they can think of one historical or contemporary cultural practice of any people that conflicts with either of these articles. Can they think of any situations where the articles might conflict with each other? What implications might this have for a legislature's difficulties in arriving at just laws, or a court's difficulties in arriving at just solutions?

The preamble to the Universal Declaration of Rights appears with the teaching strategy, "With Liberty and Justice for All . . . " in this *Update* edition.

A Look at Samoa

Western Samoa, an independent country, and American Samoa, a U.S. possession, are part of a predominantly volcanic island chain that lies in the South Seas southwest of Hawaii. Almost all Samoans are Polynesian villagers who live very simply, much as their ancestors did. They are organized into extended family groups called *aiga*, with each group headed by a *matai* (chief) who controls the family's property, represents it in the village council, and takes care of its sick or aged. Author Robert Louis Stevenson had a home in Apia, Western Samoa's capital, where he spent his last years. The Samoans honored him with the title *Tusitala* (Teller of Tales). Stevenson is buried in Apia, and today his home is used as the residence of Western Samoa's head of state.

Stevenson was an attorney, although he never practiced the profession. One wonders what he might have thought of the Samoan's simple justice system compared to that of his native Great Britain. Encourage your students to learn more about the Samoan people and customs, as well as those of other peoples mentioned in this lesson. How might our society adapt some of the customs they have that are meant to ensure justice?

Student Handout

Case Studies in Law and Culture

Case 1

A Colorado county court must decide a custody dispute between a Hmong husband and wife. The case began six months ago when the couple, who had been married for 10 years, separated. At that time, the court placed the five children in the temporary custody of the father, who was then living with his extended family in the same county. The mother was allowed frequent visitation, as established by the court.

Two months after this temporary custody was established, the mother fled with her five children to Minnesota, where her family lives. After a warrant was issued for her arrest by the Colorado county, the mother returned to Colorado. Speaking through an interpreter during her court testimony, she claimed that her children had been abused and neglected by their father and his family; she felt forced to flee with her children to her own family in Minnesota, unaware that she was breaking the law by doing so.

The mother's attorney has argued that the mother's guilt in taking her children to Minnesota must be resolved in the context of Hmong culture and that the judge must understand that Hmong define themselves in terms of their clan. The father's attorney has argued that the father put his faith in the American legal system and had been abiding by the temporary custody arrangement, and that the father's rights had been violated.

The court must decide on two issues: the mother's guilt in breaking the custody guidelines and the final custody arrangements for the children.

How do you think the court should rule on these two issues, and why? Present and explain your decision.

Case 2

In spring 1993 on a remote Connecticut hillside, Binh Gia Pham, a 43-year-old Boston postal clerk, burned himself to death as a Buddhist religious sacrifice with the help of five friends. He had been planning the act for several years to call attention to persecution of Buddhists in his native Vietnam.

To carry out the self-immolation, Pham lowered himself onto a wooden altar. His friends assisted him in several ways. One poured gasoline on his head and shoulders and nailed a sheet of metal to the altar. Others carried equipment and videotaped and photographed the event. The friends covered the corpse with a Vietnamese flag and telephoned state police from a nearby restaurant.

The police treated the case as assisted suicide and charged each participant with second-degree manslaughter—a felony carrying a maximum prison term of 10 years. A police sergeant stated, "They say it's a religious act, but that's not ours to decide."

How do you think the court should rule on this case, and why? Present and explain your decision?

Case 3

A California county judge must rule on a misdemeanor charge of cruelty to animals against two Cambodian refugees who admitted to killing a German shepherd for food. They said that eating dog meat was a common practice in their country and that they had no idea that killing a dog for food would be illegal in the United States. The penalty for the misdemeanor is a fine and/or up to one year in jail.

How do you think the court should rule on this case, and why? Present and explain your decision.

Case 4

The customary folk remedy for headaches among some Vietnamese is to massage the back and shoulders with the serrated edge of a coin. This practice leaves bruises that teachers easily notice.

Teachers and social workers are obligated to report and investigate any allegation of child abuse. A teacher noticed bruises on one of her Vietnamese student's shoulders and called in a social worker, who filed child-abuse charges against the Vietnamese family.

How do you think the court should rule on this case, and why? Present and explain your decision.

Case 5

In the Miami, Florida, suburb of Hialeah, members of the church of the Likumi Babalu Aye practice an ancient African religion called Santeria that was brought to the Carribean with slavery and to the United States with Cuban immigration in the 1960s. This religion requires animal sacrifice as part of important rituals related to death, birth, and marriage. During the rituals, animals are killed by cutting carotid arteries; they are then typically cooked and eaten.

In 1987, Hialeah enacted a law to stop Caribbean immigrants from killing chickens, pigeons, doves, ducks, goats, sheep, and turtles in the practice of this ancient religion. Officials explained that they adopted ordinances against animal sacrifice in response to citizen concern about religious practices that are inconsistent with public health and community moral standards.

The church argued that the city and state of Florida permit the killing of animals for many secular reasons (e.g., food and recreational hunting and fishing), so that the ban on religious ceremonial sacrifice as practiced by Santeria followers is wrongful government infringement on their religion. The minister says that his religion should be institutionalized as other faiths have been so that its practitioners can become part of mainstream America.

How do you think the U.S. Supreme Court should rule on this case, and why? Present and explain your decision.

Case 6

Anosau Foutuua, a Samoan immigrant, was stabbed to death outside the door of his home in Hawaii by Tonny Williams, also a Samoan. Williams was charged with murder and jailed until his trial. His family responded to the crime by initiating an ancient traditional Samoan ceremony called an *ifonga*. In this ceremony, two Samoan high chiefs (one of whom was Tonny's father) went to the Foutuua family home covered with treasured Samoan fine mats and gifts of food, money, and handicrafts. Through the ceremony, the Williams family placed themselves at the mercy of the Foutuua family and asked for forgiveness. The Foutuuas accepted the offer and gave something in return. They agreed that they would not testify against Williams at his trial. The prosecutor's office was not pleased about this decision. Without the eyewitness account of the stabbing, Williams would serve about 10 years in prison rather than a life sentence.

Should the U.S. legal system recognize the ifonga *as a legitimate form of handling criminal cases when both parties are Samoan? Why or why not?*

Case 7

Many Native American groups concerned about recent Supreme Court decisions that weaken religious freedom of indigenous peoples are seeking congressional action. In response to concerns, Senator Daniel Inouye of Hawaii has introduced *The Native American Free Exercise of Religion Act of 1993* (S. 1021). Proponents hope this legislation will restore human rights that they feel were unfairly denied through the following Supreme Court decisions:

Unprotected Sacred Sites

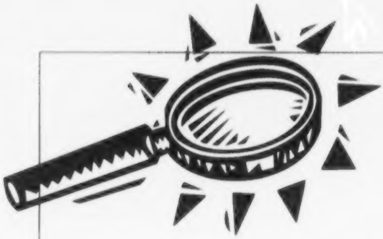
Native Americans are concerned that a growing number of irreplaceable tribal sites no longer under federal protection may be destroyed. In *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), the Supreme Court allowed the Forest Service to withhold protection of an ancient Indian sacred site located on federal land. A Native American group in Colorado views this decision as a barrier to their efforts to block construction of a visitor center at a popular tourist attraction, the Garden of the Gods—a site they consider sacred.

Peyotism

Peyote, a cactus plant that grows only along the Rio Grande, has been used in Indian religious ceremonies for centuries. While classified as an illegal substance because of hallucinogenic properties, it serves as a sacramental symbol similar to bread and wine in certain Christian churches. In the 20th century, the Drug Enforcement Administration (DEA) and 27 states created laws to regulate the use, possession, and transportation of peyote for ceremonial purposes.

In *Employment Div. of Human Resources of Oregon v. Smith*, 110 S. Ct. 1595 (1990), the Supreme Court denied unemployment compensation to two Native Americans who were terminated from their employment as counselors at a substance abuse rehabilitation center because of their participation in a sacramental peyote ceremony. The two employees had signed a contract agreeing not to use illegal drugs. Following the Smith decision, an elderly member of the Native American Church in Oklahoma was arrested for peyote possession. This arrest is one of the events that cause Native Americans to believe that the Smith decision is a threat to practitioners of peyotism.

If you were a member of Congress, what legislation, if any, might you support in efforts to restore Native American religious liberties?



Court Resolutions and Reasoning

Case 1

The Colorado county district judge admitted that he was stymied by the cultural and language barriers posed by the custody case. The judge appointed a separate attorney to represent the five children. After hearing the testimony of all parties, as well as that of psychologists, the court decided that the case should not be settled by the judicial system, but by the couple's own people. The case was referred to the Laotian Family Counsel, a mediation group of Laotian and Hmong located in cities where large numbers of Southeast Asian refugees have settled. Charges were dropped against the mother for breaking the custody arrangement and leaving the state with her children, and she was admonished to familiarize herself with the laws of the state and country where she resides.

Case 2

During a court hearing, all five Buddhists accused of assisting with the ritual suicide applied for and were admitted to an accelerated rehabilitation program. Admission to the program was not tied to entering pleas of guilt or innocence. The state did not support or oppose the application. If the accused remained conviction free for a year, all criminal charges related to assisting with the religious sacrifice would be dropped.

Case 3

The California judge dismissed all charges against the Cambodian refugees for misdemeanor cruelty to animals. In the decision, the judge stated that killing an animal for food is not illegal unless done in a cruel way; the evidence did not indicate that defendants had inflicted any unreasonable pain on the animal. The judge supported his decision by citing common practice in slaughterhouses and on farms.

Case 4

When prosecutors learned about the Vietnamese folk remedy for headaches, child-abuse charges against the family were dropped.

Case 5

In *Church of the Likumi Babalu Aye, Inc. v. Hialeah*, 113 S. Ct. 2217, the Supreme Court reversed the decision of the lower courts by overturning the city ordinance in a 9-0 vote. In writing for the Court, Justice Kennedy stated that the ordinance was not neutral because it failed to prohibit nonreligious uses in a similar way to religious uses. The city failed to explain why religion alone must bear the burden of not killing animals.

Case 6

As a result of the *ifonga*, the Foutuua and Williams families have a very good relationship. The Williams family did not expect the Foutuua family to refuse to testify. The families do not see the ceremony as thwarting the criminal justice system. Courts in Hawaii and California have looked for ways to integrate the *ifonga* into the criminal justice proceedings so as to serve both systems of justice. While the practice is not uniformly accepted, the courts have "accepted the ifonga . . . a strong cultural tradition of the Samoan community" as part of a plea-bargaining process. (For more information on Samoan traditions of justice, order "Justice in America" Lesson 1 #909677 from the CRADLE repository.)

Case 7

S. 1021 will be debated in the 103rd Congress. If passed, it will affect the Supreme Court decisions in the following ways:

> The bill provides protection to Native American sacred sites by requiring the federal government to give notice to relevant Indian tribes, Native Hawaiian organizations, and Native American traditional leaders that an undertaking may impact a site; consultation must be held to minimize the impact, and a written impact statement must be prepared.
>
> With regard to peyotism, the DEA will regulate Indian peyote harvest and distribution using existing regulations that cover use, possession, and transportation. The bill will restore the "compelling-state-interest test" as the legal standard for protecting Native American religious freedom in all instances not specified in the bill.

Through Teachers' Eyes: Teaching About Justice and Injustice

A look at how justice is—and may be—taught by social studies teachers

Andra Makler

> In the Ciceronian view . . . justice is primarily a citizen's virtue. That is why he argued that wisdom without justice can do nothing, whereas justice without wisdom can achieve much. Most of us are not wise, but we can be just, and because real justice depends on decisions made by all citizens, it alone binds communities together, while injustice tears them apart.
>
> —Judith Shklar, *The Faces of Injustice*

For the past year, I have been interviewing experienced social studies teachers in three Oregon counties about their concepts of justice, asking whether they teach about justice and what the reasons are for their curricula and teaching choices. Some consistency emerged from these conversations: teachers want their students to value democratic ideals and recognize when our policies and practices fall short of them; to respect the rights of individuals and groups to differ from the norm and also to recognize that social norms change, albeit slowly; to both support the law and question authority. They believe that students are interested in justice, especially their own fair treatment.

Although teachers see teaching justice as important, they are wary of imposing their values on students or of offending special-interest groups within their communities. Only one teacher of the 18 in the sample organized his course around justice as an explicit theme. The others said justice "issues come up—and the kids ask questions." One teacher reminded me that "You can't cram justice down people's throats, you know. I don't have the right answer. The idea of justice certainly comes up numerous times during the school year in a number of different settings."

It troubles me that social studies teachers may see only two choices when teaching about justice: to leave it to students to find their own way or to indoctrinate them. Why do experienced teachers adopt this position? What do they teach about justice, and how? In this article, I try to reflect the complex views teachers articulate, examine their examples of teaching justice, and explore ways that teachers might directly help students to think systematically about justice as an ethical precept, a legal standard, and a personal value.

Characterizations of Justice

The landscape of justice is a difficult terrain, crisscrossed for centuries by philosophers, lawmakers and law enforcers, and ordinary people. Not surprisingly, teachers' concepts of justice are crisscrossed by a rich network of interconnections, with three themes dominating the landscape as mountain peaks dominate valleys:

- justice as right and wrong
- justice as fair treatment
- justice as an ideal or standard

Two secondary ideas emerge as connecting streams, that of justice as moral action and of the relativity of justice for individuals and among cultures. The examples below are a sampling of teacher positions, chosen because they clearly express the dominant themes described above and some of the tensions in those themes. All names are fictitious, but teachers have verified the quotations' accuracy.

Right and Wrong

Carrie Royce, an urban high school teacher of social studies and language arts, was very clear: "I will define justice for you, and that's right and wrong . . . also, the cultural idea of right and wrong. Justice sitting here in Portland, Oregon, at this high school, is gonna be different than justice in a high school across town. And it's gonna be different than justice in China."

Mitch Smith, a suburban teacher, agreed that justice is "each person's

Andra Makler is the coordinator of the M.A.T. Intern Secondary Program at Lewis & Clark College in Portland, Oregon.

perception of what's right and wrong. . . . I can draw some issues where my students would be in consensus . . . but, if I probe long enough, I'll find areas where we disagree on what justice is."

Kate Harris, a teacher whose students were mostly white working class, asserted: "To me, what is just is what is right. What is right is based on morality, on law, on whatever the circumstances you're working or living in." But, like Ms. Royce and Mr. Smith, she believed that "There's a lot of relativism out there. I don't think most people see justice as an absolute thing."

Fair Treatment

For Marc Jura, an inner-city African-American teacher, fairness was primary: "I don't equate justice with being right or wrong. Justice is trying to achieve a sense of fairness . . . of equity." Walt Cochran, a white inner-city teacher, agreed: "I think I would have to use the word *fairness* more than anything else. Although justice doesn't always mean an equitable outcome, it certainly means a fair outcome, given the variables involved . . . a fair chance to gain the same level of material goods or opportunities. Even though you might not insist that the final outcome be equal, the means of getting to the final outcome would be equal at some point."

"Teachers saw 'curriculum potential' to teach about justice in U.S. history, government, global studies, sociology, psychology, economics, and world literature."

Jon Estes agreed that justice meant "fair and reasonable sharing of the earth's resources, and fair treatment in terms of law." A U.S. history and global studies teacher in a high school where neither students nor their parents were sure that education will translate into good jobs, he was concerned about absenteeism and apathy: "Teaching *about* justice implies a kind of academic consumption. Teaching *for* justice is trying to change kids in a way, to encourage them to be active, questioning citizens who have a thirst for justice in the country and want it to happen. Somebody I know used the term *teaching for outrage and empathy*. That would be an element of what I mean: to believe that they can change things and make a difference."

Ideal or Standard

In a small city with only one high school, Stan Gray equated justice with "Plato's ideal moral law," adding that "probably for every person on this planet, there's an individual interpretation of what this is." Though he felt "stuck with the ideal, where there's no answer," Gray described himself as a pragmatist and offered the following definition: "Justice is when you break the law, you get in trouble, and there are consequences to your behavior. And that's just the way it is, based on the laws and mores of the culture."

In a suburban district with three high schools, Mona Dietz described justice as "what society determines, generally through law, and sometimes through tradition." She believed there were some "common understandings of justice" of "very limited scope," including "things that are generally supportable by law, or possibly by tradition, and that exhibit fairness and integrity. . . . Beyond that, I think it's very individual." Like Gray, Dietz maintained, "You're either a just person or you're not."

Inner-city African-American teacher Greg Bond defined justice as the ideal of "moral, just, equitable treatment of all Americans." He described this as an "esoteric philosophical definition that I wish we operated by," although, in reality, justice was "different for different people." Bond said, "That's what I think we've learned in this country, based on how we see people being treated." He felt American ideas of just treatment differed according to race and gender. Citing the rape trials of Mike Tyson and William Kennedy Smith, Bond claimed whites believed that Mike Tyson got "his justice" and that, while African-American females might agree, most African-American males did not.

Ethics of Care and Justice

Recognition that justice requires us to take account of and be responsive to an individual's particular circumstances, and life history, creates conceptual conflict for teachers and their students. Researchers (e.g., Carol Gilligan and Nona Lyons) and philosophers (e.g., Nel Noddings and Debra Shogan) characterize this position as an ethic of care that is in some ways oppositional to an ethic of justice. For example, an ethic of justice usually requires impartial application of rules and consequences, while an ethic of care requires that individual circumstances and the context surrounding events be taken into account. An ethic of care was deeply embedded in teachers' concepts of justice, which at the same time acknowledged the social function of law as a system of rules and consequences related to breaking those rules.

Relativism of Justice

In all 18 interviews, teachers acknowledged contradictions between their belief that some part of the concept of justice ought to hold true across cultures and persons and their experience that students and adults held idiosyncratic ideas about justice and experienced justice differently depending upon their race, gender, and class. The knowledge of different cultures and value systems accumulated in the course of teaching social studies made them aware that, although all societies might have a concept of justice, the meaning and implementation of justice varied according to religion, time period, and the society's structure. Carrie Royce, who has lived, studied, and taught in several Asian countries, noted, "For my Western self, there is the image of Blind Justice. But another image is of Yuan Li, the Chinese goddess of mercy, who has her eyes open—for empathy and understanding."

Royce related her experience on a jury where, because of her concern about "gray areas" and her desire to be sensitive to individual circumstances, she convinced people to let the defendant go; then he committed a terrible crime. She sighed and said, "That case made me realize that, to have any kind of social stability or control, sometimes you have to maybe not see the gray areas. . . . But, you see, with this question . . . I want it to be an open question that I ask and re-ask and re-ask."

Teaching about controversial issues such as political ideology (the "best" way to organize a family or a nation, the ethics of abortion or capital punishment) has always been difficult. Today, the assumption that traditional American values of individual freedom, competition, and equal treatment are universal and superior to other cultures' values is open to question as scholars, teachers, and students examine the actions of those professing such beliefs and the consequences of those actions for indigenous peoples and the environment at home and abroad. For sensitive teachers well versed in their subjects and the controversies surrounding multicultural education, helping students sort through the different value claims and practices of different societies can be a mine field. Despite the conflict and disagreement potential, teachers said they cannot avoid teaching justice, but most said they did so indirectly or through their relationships with students.

Cicero (106-43 B.C.) was a great Roman orator and leader of state. He became a consul, Rome's highest elected political office, in 63 B.C. A supporter of republican government, he opposed the rule of the First Triumvirate, which included Julius Caesar, and the Second Triumvirate of Octavian, which included Mark Antony. He was finally killed for his beliefs. Among other topics, his works examine law (*De Legibus*) and law-related issues such as ethical behavior (*De Finibus*), one's duties in life (*De Officiis*), and forms of government (*De Republica*).

Justice in the Curriculum

In *The Teacher-Curriculum Encounter*, Israeli researcher Miriam Ben-Peretz notes that experienced teachers recognize the "curriculum potential" in textbooks, photographs, videotapes, and classroom encounters. They adapt materials so that students can explore situations that do not have easy answers and challenge them to reflect on their own values and priorities. Teachers I interviewed saw "curriculum potential" to teach about justice in many materials typically used in U.S. history, government, global studies, sociology, psychology, economics, and world literature. The most frequently cited opportunities to teach about justice were:

1. *Discussing the place or role in our society of important American documents* (e.g., the Constitution and the Declaration of Independence). Question for students: If these documents stand for justice, then why is there injustice? Possible activity: Compare what the documents promise or guarantee with the reality of U.S. life and consider what groups of people have been included or excluded.

2. *Studying various groups' historical oppression to raise students' consciousness and enable them to recognize that history has multiple interpretations.* Activities mentioned included document analysis and role playing.

3. *Examining power abuse by governments or authorities.* Teachers mentioned the Watergate break-in, Jackson's refusal to enforce the Supreme Court's decision that the Cherokee had sovereignty over their land in Georgia, the internment of Japanese-Americans during World War II and the conflict in the United States between secret intelligence services (e.g., the CIA) and freedom of information.

4. *Considering colonialism's effect on societies all over the globe, historically and now.* Question for students: Is it fair to dominate another group of people? Which culture's values should have priority? (Teachers' uncertainties about how to approach values conflicts surfaced most often when they discussed teaching about transitional societies.)

5. *Exploring the question, "To what degree is our society democratic?"* Here, teachers used specific cases, including treatment of minority groups, slavery, application of immigration law to different immigrant groups, and analysis of who participates in making government decisions or passing legislation.

6. *Researching the homeless problem's roots.*

7. *Conducting mock trials of various officials.* Examples included Harry S Truman, for dropping the atomic bomb; the senators in Shakespeare's *Julius Caesar*, for wanting to get rid of a dictator despite his popular support; the Dreyfus case; and Socrates's trial.

8. *Requiring students to assume the perspectives of persons whose lives differ from their own, usually to develop empathy with oppressed groups.* Examples included "seeing through the master narrative" and being able to articulate the point of view of the oppressed and articulating the Japanese view of the United States based on "our country's involvement in dropping the bomb." Fiction most often cited explored gender relationships and/or mistreatment of women by males in their own society (e.g., Zora Hurston's *Their Eyes Were Watching God* and Chinua Achebe's *Things Fall Apart*).

9. *Correcting the historical record's inaccuracies about minority groups, especially African Americans.* The

teachers present the groups as having a history that predates their involvement with white European-Americans and acknowledges their technical and cultural contributions to society.

10. *Providing chances for students to develop confidence in their ability to acquire an informed opinion about legal and other complex matters.* Teachers do not want students to be intimidated by authority or expertise. They try to demystify the system by sending students into the community to have contact with real practitioners in their settings; by having students write their own criminal statutes before they read the actual statutes; by asking students to form opinions in legal cases before reading the decisions and later "sharing the vote on split decisions so that students can see the number of judges who sided with them." Several teachers felt that involvement in community service "empowers students" to see themselves as able to contribute meaningfully to improving society, but they believed that to require such participation was a contradiction.

"Teachers require students to draw their own conclusions."

11. *Exploring the way language is used to distort reality.* Jon Estes said he wanted his students "to see through justifications. I'm thinking about the relation between justice and justification. So much of what those in power do is use terms and words [to cover] up reality. . . . Those not in power are controlled by language used in a certain way, to dominate and enslave and to fool people to a certain extent." Examples teachers gave included world history written from the European point of view; President Bush's "coded message" that African Americans rioting in protest of the Rodney King verdict in Los Angeles were "thugs" while he did not use that term for other looters; analyzing a Nazi memo about the "final solution" to see how ordinary language can mask awful deeds.

12. *Discussing civil rights: the movement, its issues, and related legal cases.* Civil rights and the Cherokee removal were the most frequent examples of curriculum about justice. U.S. history classes focus on the experience of African Americans and on women's suffrage, with mention of workers' struggles against big business and disparities in standards of living during the "Gilded Age" and the Great Depression. Classes on contemporary society focus on treatment of homosexuals, especially the effort to pass laws that extend rights held by all citizens specifically to homosexuals. Occasionally, teachers address Supreme Court efforts to restrict religious practices of Native Americans or issues of native people's sovereignty (e.g., the James Bay case in Canada).

13. *Examining policy and trade issues with a global impact on the environment.* These are politically sensitive issues in many communities with a shrinking industrial base. Teachers feel they must tread softly on any quality-of-life issue with potential to engender criticism of "the American way of life."

Lessons on Justice

Social studies teachers are doing important, difficult work in academically sound and creative ways. Rather than presenting history as a string of dates and events, or economics as a set of givens about market superiority (as critics so often charge), the teachers I interviewed consciously organize their classes to develop their students' ability to question the world in which they live and the reasons the present looks as it does. Teachers respect students' potential to be thinking, responsible adults and design lessons that require students to draw their own conclusions. In so doing, they are enacting current cognitive theory that meaningful learning takes place when students construct their own knowledge, not when they merely parrot back information.

Teachers see the world in which adolescents live as full of pressures and conflicts. All teachers in the sample said that their students feel powerless and unfairly treated by authority figures: suburban teachers of white middle-class students as well as inner-city teachers with a diverse student population of many ethnic minorities, including recently arrived immigrants who speak limited English. They worried that school might not assist students with the "difficult, ordinary daily choices" they faced. This is a troubling reality, and it clearly influences teachers' efforts not to be perceived by their students as moralizing, authoritarian adults.

Mistreatment, Rights Denial, and Government Abuse

Teachers said they teach justice when they focus on mistreatment of minority groups, denial of civil rights to certain groups, or the passage of laws designed to rectify past wrongs. Like Kate Harris, whose unit on the Trail of Tears is organized as an exercise in critical reading of primary documents to develop students' analytical skills, most teachers do not deliberately frame their lessons in terms of justice. Greg Bond spoke for the group: "I don't teach a unit called 'justice.' I teach several units and *the students* bring up what they think is just or unjust."

Colonialism is seen as a ripe topic in connection with which students can explore justice issues. Laura Henly teaches a course based on literature written by people living in societies under colonial or postcolonial rule; these are societies in transition where traditional values are being challenged. Henly's students use Albert Memmi's interdependency model from *The Colonizer and Colonized* as a rubric for reading novels that depict societies where the husband's and father's rights are supreme and the wife and mother has no legal rights, even when the father is unable to support his family or commits adultery.

Based on her students' journals, Laura Henly believes such novels raise issues of justice; class discussion often centers on the cultural relativity of values. One question that represents a "bind" is whether the students, as individuals or a class, "are qualified or able to judge" when they "read about something that they don't think is fair or just," such as wife beating in Achebe's *Things Fall Apart*. She asked, "Is it OK for us to apply our [moral] standards? Whose definition should we use?"

No Central Idea?

Cultural sensitivity is more than a buzz word for teachers. When I asked directly, "Is there some core idea that's central to the concept of justice, that holds for all circumstances, even if we have different standards that we apply?" most teachers agreed with Kate Harris: "No, I don't think that there is. In other words, what is just in American society is not necessarily what's just in Chinese society." Matt Lyons was the only teacher to say that there were some universals in the concept of justice; he listed "equality, respect, honesty, liberty, fairness."

"What I am asking is whether students learn more about injustice than justice from their current curricula."

Without common understandings about what justice means or looks like, it is difficult to judge others' practices as "less just" than our own. However, teachers felt it safe condemning cases of historical oppression, even though some students have difficulty understanding the ramifications of such judgment. For example, many white male students vociferously resist the idea that they are somehow guilty for the historical mistreatment of people of color in this country. That resistance often becomes the lesson's focal point. Without a frame of reference, teachers have no way to refocus the conversation or to help students explore the construction of justice as an evolving ideal that has gradually come to include more groups outside the mainstream of society.

Suffering and Resource Distribution

Teachers are reluctant to assume the moral guardian's role, although history and legislation have given it to them. Stan Gray teaches economics, sociology, and psychology. His curricula address issues such as "the imbalance of wealth and opportunity [that] continues in our cities" and the unfair distribution of global resources. Instead of framing these as justice issues, his approach is that "lots of egocentrism and very little love" create conditions of inequity.

Quality-of-life issues that are class based rather than a matter of individual responsibility crop up in materials that show certain segments of the population as "stuck" in poverty or a cycle of helplessness. Marc Jura deliberately injects such issues into his economics and government classes, using newspaper articles that depict certain city neighborhoods as safer than others. Although he asks students to consider the socioeconomics of differentiation in life chances, an issue central to the sociological theory of Max Weber and to economic theory, Marc doesn't discuss theory. He presents students with realities and hopes they will develop a critical consciousness as they see that more poor people of color live in unsafe neighborhoods than poor white people. He wants students to recognize that, when distribution of benefits and burdens is a function of involuntary membership in a "segment of the population" rather than of "individual responsibility . . . *that's* a justice issue"; but the lesson is implicit.

Quality of Life as a Global Issue

Teachers link quality-of-life issues to differences in power among nations. When asked whether there was "a kind of justice specific to international affairs," Henly replied, "In the real world, yes. Because of the difference of power [between] a third world country and a country that's a first world power." Then she asked, "Is it just, for instance, to expect a third world country to turn down storage of toxic wastes if it means feeding your people? Is it just for a country like Germany or the United States to even ask? Is it just in this country for us . . . to encourage or to ask Native Americans to store nuclear waste? . . . It seems there's a basic injustice there."

Mitch Smith wants his students to develop a sense of stewardship for the global environment. Instead of developing exclusive feelings of patriotism and love for the United States, he wants students to see themselves as members of a global community. Issues of environmental protection thus become complicated justice issues. Mitch said, "I guess I go on the premise—the John Locke in me coming out—that governments are there to serve the people and provide basic services or protection for them. Their actions should be measured by whether they're just or not . . . does the government do what's best for their own citizens? Or do they do what's best for the global or regional community? And my values at this point would be more for the global or regional community and not for the specific group of citizens. I guess I still would see that government doing what's best for the people, but not necessarily for the people that may have created that government."

Teachers who share these concerns display an emerging global conscience that conflicts with their recognition that protection of the environment is a culturally relative value that may depend upon a nation's achievement of a certain standard of living for the majority of its populace. They raise a very difficult question. If you believe a social contract resting on consent of the governed is a basic tenet of a just society, and that the concept of justice differs according to the social arrangements of each society, the issue of a globally just standard of living or quality of life is indeed problematic.

Giving Justice Its Due

In raising questions about teaching justice, I am not saying that what teachers currently do is wrong. I respect the 17 years' experience that lead Laura Henly to feel that students will learn more about justice if she permits them to reflect privately in their journals than if she devises a lesson where she determines the justice questions the class will discuss. What

I am asking is whether students learn more about injustice than justice from their current curricula.

You may have noticed that Henly switched from speaking of justice to injustice. This was typically the case. Most of the examples teachers gave of justice issues actually were about injustice. For example, Mona Dietz used the example of the United States as a "world empire" with a justice standard different from that of a "country that's very much in debt or a developing country such as Mexico in terms of their quality of life or their standards. . . . Is it just for the United States to move companies from here to Mexico so that they don't have to adhere to environmental laws that the United States has established?"

Judith Shklar published a series of her lectures at Yale University in 1988 in *The Faces of Injustice*, a book that examines the importance of "giving injustice its due." Strangely, it seems as if social studies teachers are giving injustice more than its due. My guess is that this is motivated by the belief, passionately expressed by Rousseau, that developing a sense of injustice is a necessary precursor to developing a sense of justice. As Sandra Thomas suggested, "I guess it gets down to empathy. You have to put kids in a position where [they] have felt injustice to know what that's like. Yet, Shklar proposes that justice and injustice are not mirror images. Thus, learning about justice's features may not prepare students to understand injustice. I would add that, perhaps even more important, teachers cannot assume that learning about injustice will teach students to value justice.

Certainly, it is important for students to be able to put themselves in someone else's shoes, but this is not enough. Students need assistance from the taught curriculum in exploring the meaning of a just society, in considering whether democratic standards of justice require particular kinds of arrangements between citizens and their government and among the citizens themselves. Adolescence is when young people explore their understandings of adult relationships and their perspectives on their emerging relationships with friends and strangers in their immediate surroundings and in the wider community. This is an appropriate time to explore democratic citizenship concepts and to support belief in democratic values.

Most teachers are familiar with Bloom's taxonomy. Teacher education programs routinely provide this model as a basis for developing students' cognitive thinking through activities that involve students in critical analysis, synthesis, and evaluation. But teachers are less familiar with the equally important affective taxonomy developed to complement and complete the cognitive taxonomy. Students deserve their teachers' assistance in exploring and constructing a value system; they need a standard against which to test their emerging notions of justice and the meaning of a good life.

I am not a Pollyanna. I am not suggesting that teachers should stop encouraging their students to develop feelings of empathy or outrage, or that all teaching about justice and injustice should be highly structured, teacher directed, and explicit. Obviously, there is value in permitting students to recognize and name for themselves the ethical issues implicit in a situation, whether fictional, historical, or contemporary. But this must be accompanied by systematic, thoughtful study of the changing meaning of justice in use in different societies, including our own. And that does not appear to happen now. If the teachers I interviewed are representative of their colleagues, this may be because teachers themselves are not familiar with justice theories.

Testing Justice Ideas

Sandra Thomas said, "[Justice] gets back to ethics or a moral code. We can assume most people have internalized [some kind] of moral code that applies in personal relationships. But, then, what about prejudice, racism? There are laws that legislate against that . . . but . . . you have to get kids to realize they have . . . the power to make justice or injustice." Sandra's belief that justice is linked to a moral code echoes that of classical and some contemporary philosophers. Thinkers like Plato, Aristotle, and modern Catholic philosopher Alisdair MacIntyre see justice as a second-order construct that depends on a priori assumptions about the qualities of a good life and the kind of person one aspires to be. In this view, justice is a concept that emerges from a society's notion of proper relations among persons, including power relationships in the private sphere (among family members or between friends), the public sphere (among citizens, between citizens and their rulers, among members of the ruling class whether they are appointed or elected or whether they inherit their office). Such relationships are seen as the stuff of the social order, dependent upon individuals enacting a set of internalized norms for the appropriate fulfillment of their roles as spouse, parent or child, ruler or soldier, friend or enemy.

If we extend this idea, we see that, although each society has a concept of justice, the concept of a just or "right" relationship depends upon other values. Therefore, the "right" relationship between autocrat and citizens in a monarchy or dictatorship is different from that between elected official and citizens in a democracy. A question we might want our students to address is whether they think this ought to be the case: Should we accept as justice a dictator's right to absolute control over citizens? Should we accept as just a monarch's power to collect taxes without the consent of those being taxed? Is it justice when a society allocates and restricts occupational positions on the basis of birth into a particular social class (as Mao did during the years of the Great Leap Forward) or on the basis of an examination score that has no relationship to the position's actual duties (as was done in Confucian China)?

Justice Beyond "Evening Score"?

Adolescents have all experienced situations they regard as unfair, and

(continued on page 49)

Teaching Strategy

What Are the Goals of Corrective Justice?

Joseph Jackson

Purpose of Lesson

This lesson introduces students to the goals of corrective justice and examines the difference between wrongs and injuries. When your students have successfully completed the lesson, they will be able to define corrective justice, explain its goals, and identify wrongs and injuries in different situations.

Terms to Know

wrong
injury
correction
prevention
deterrence
proportionality
distributive justice

Introduction

> *If a man destroy the eye of another, they shall destroy his eye.*
> —Hammurabi, about 1750 B.C.

Find a newspaper article that describes a response to a wrong, an injury, or both. Have your students read the article and decide whether the response is fair and proper. Ask them to think of some other news stories they've heard where a wrong or injury was involved and someone sought a remedy. What do the students think of Hammurabi's remedy above?

What Is Corrective Justice?

Use the following situations to introduce students to the concept of corrective justice. Tell students that each situation involves an issue of corrective justice. *Corrective justice* refers to fair or proper responses to wrongs or injuries.

- Convicted of theft, Mustafa was taken into the public square, where the executioner chopped off his right hand with a sword.
- While Paul was stopped for a red light, Sarah crashed into his car. The court ordered Sarah to pay $5,500 for damages to Paul's car and $8,376 for his medical bills.
- Three members of a gang beat and robbed a 60-year-old woman standing at a bus stop. She was hospitalized for two months and is permanently crippled by the beating. The gang members were arrested and placed in juvenile hall for six months, where they were given psychological counseling, released, and placed on probation for one year.

What Do Your Students Think?

Ask students what is fair or unfair about the response to each wrong or injury described above. What values and interests, other than fairness, are important to weigh in choosing a proper response to a wrong or injury?

Why Is Corrective Justice Needed?

Explain to your students that, in all societies, there are situations in which one individual or group *wrongs* or *injures* another. The wrong or injury may be accidental or intentional. Historically, people have felt that, if someone commits a wrong or causes an injury, things should be set right again in some way. Ideally, this means restoring things to the way they were before the wrong or injury occurred. In some cases, this may be possible; but, in many cases, it is not. For example, one cannot restore a life. Since it is not always possible to restore things to the way they were before, people have developed other ways to respond to wrongs and injuries.

Fair or proper responses to wrongs or injuries may vary widely. In certain situations, one might wish to require a person to compensate in one way or another for a wrong or injury done to others. Sometimes, courts punish wrongdoers by fines, imprisonment, or even death. Such responses may not only correct the wrong or injury, but also may prevent or discourage further wrongs or injuries. On the other hand, the most desirable or proper response may serve other purposes, such as the wish to forgive or pardon a person. For example, if a friend with little money accidentally broke something you owned, you might not want to ask the friend to replace the object or compensate you for the loss. However, you might expect an apology.

The goals of corrective justice can be summarized as:

- *correction*—providing a remedy or imposing a penalty to set things right in a fair way
- *prevention*—responding in a way that will prevent the person from wronging or injuring again
- *deterrence*—discouraging people, for fear of the consequences, from committing wrongs and causing injuries

Ensuring proper responses to wrongs and injuries is important not only with regard to criminal behavior and civil matters but also in families, schools, and other areas of the private sector. Correction, prevention, and deterrence are essential to society's very existence. Without them, disorder and chaos may result.

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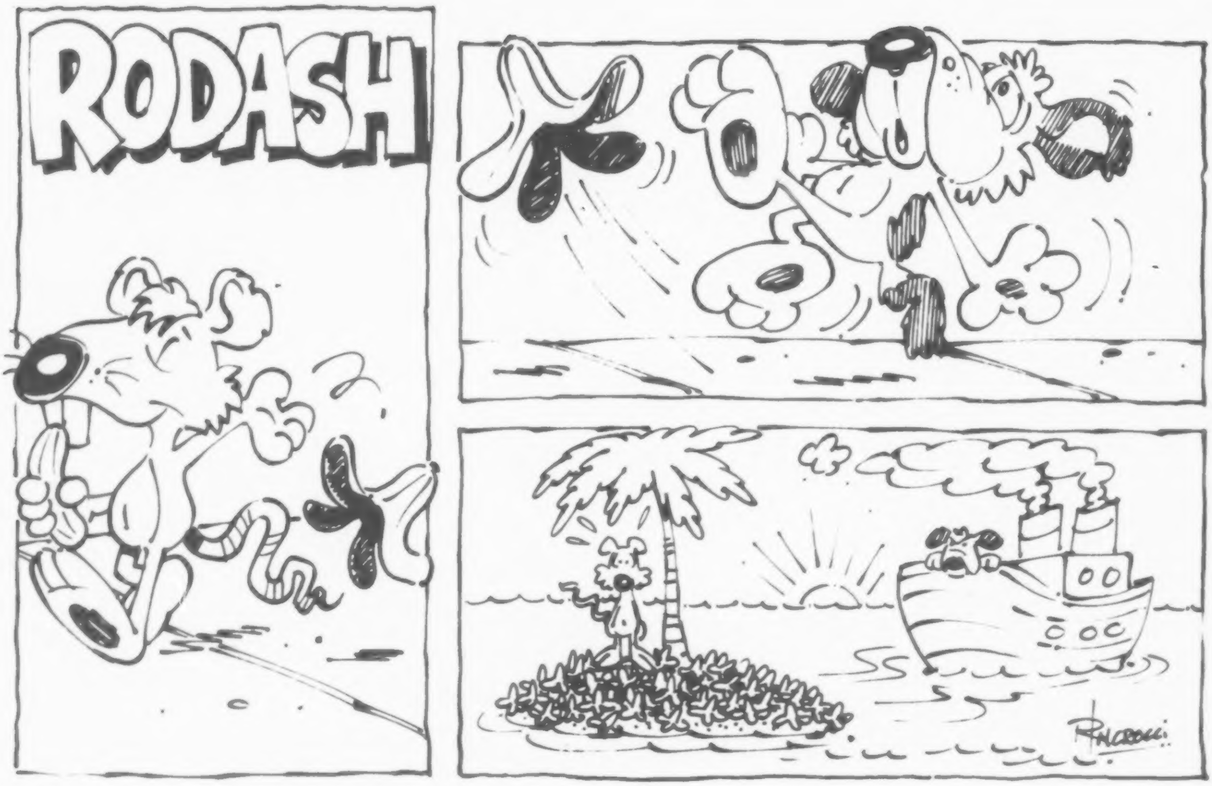


Which frame shows a wrong being committed? How does an injury result? Is the solution "just"?

What Do Your Students Think?

1. Have students work with a study partner or in a small group to make a list of the most common responses to wrongs or injuries that they have observed.
2. Have students describe some situations in which a response to a wrong or injury was fair. Why was it fair?
3. Have students describe some situations in which a response to a wrong or injury was unfair. Why was it unfair?
4. What might happen in a family, school, community, or nation if no attempts are made to provide fair responses to wrongs or injuries, or to deter or prevent them? Why?
5. In what types of situations might it be right to let a wrong or injury go uncorrected, but still do something to make sure such wrongs or injuries do not occur again?

How Should We Deal with Corrective Justice Issues?

Explain to students that deciding how to respond to a wrong or injury may be simple in some situations, such as when a young child takes away the toy (property) of another child. Our sense of justice may be met by merely restoring the toy to the owner. Our interest in preventing such things from happening again may be met by informing the child that it is wrong to take another person's property without permission. It is hoped these actions will teach the child proper behavior.

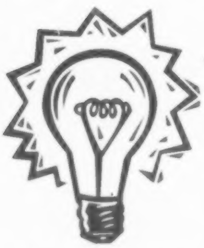
In other situations, finding a fair response to a wrong or injury may be more difficult. Unfortunately, there is no simple formula in difficult situations. There are a number of "intellectual tools," however, that can be useful when making such decisions. They form a procedure students can use to make thoughtful decisions about how respond. Share the steps in this procedure with your students.

1. Identify the wrong and/or injury.
2. Evaluate its seriousness.
3. Evaluate the wrongdoer's conduct.
4. Evaluate background and character.
5. Consider possible responses to the wrong or injury and the reasons for choosing them.
6. To decide what the best response(s) is, consider related goals, values, and interests.

The chart organizes these steps for use with the second critical thinking exercise below. Have copies of the chart on hand for your students. Review "Terms to Know" with them before they use the chart.

What Is the Difference Between Wrongs and Injuries?

In examining issues of corrective justice, it is important for your students to understand the difference between wrongs and injuries.



Hammurabi was the great Babylonian king who developed the Code of Hammurabi—one of history's first law codes. Its main principle was that the strong should not injure the weak. Hammurabi ruled Babylon from 1792-1750 B.C. The stone slab on which the code was carved was found in Iran in 1901. It shows Shamash, the Babylonian patron of justice, commanding the king to establish just laws. If your students were the American "patrons of justice," what codes would they command Congress to enact? On what would they place the codes, and where would they display them?

- A *wrong* is conduct that violates a duty or responsibility that is imposed by laws, rules, customs, or moral principles.
- An *injury* is harm or damage to persons or property, or violation of a person's rights.

In some cases, conduct may be wrong and also cause an injury. In others, conduct may be wrong but cause no injury. There also may be injuries caused without wrongful conduct. The following exercise asks your students to determine whether situations involve a wrong, an injury, or both.

Critical Thinking Exercise 1:

Examining Wrongs and Injuries

With study partners, have your students read each of the following situations, answer the questions at the end of the exercise, and share their answers with the class.

1. George drove his car through a red light. Fortunately, no accident occurred.
2. Will, a mechanic, forgot to tighten the wheels after he changed the tires. The left front wheel came off while the customer was driving, and the car crashed into a parked truck.
3. When Monica dove for the volleyball to save the point, she slipped and broke her wrist.
4. Dozens of people died and hundreds of homes were destroyed when the hurricane swept across southern Florida.
5. The security guard shot at the bank robber but missed. The bank robber took a hostage to ensure his escape. Later, the hostage was released.

What Do Your Students Think?

1. In each situation, what were the wrongs and/or injuries?
2. In which situations does your sense of fairness or justice make you want to respond in some way to "set things right"?

Critical Thinking Exercise 2:

Proposing Responses to Wrongs and Injuries

Divide your class into four groups. Assign each group one of the following situations. After reading it, the group will answer the questions at the end of the exercise and use the tool chart to organize a class presentation of their answer.

1. Leslie went into a department store and tried on a shirt. She really liked the way it looked but didn't have enough money to pay for it. Leslie decided to steal the shirt. She put it into her purse and left the store. Suddenly, a security guard grabbed her by the arm. She was caught.
2. Jalil drank too many beers while watching a football game with his friends. On the way home, he failed to stop as the traffic light turned red. Jalil's car smashed into the side of a small pickup truck, killing the passenger and seriously injuring the driver. Jalil also suffered injuries. He is not expected to regain full use of his legs.
3. Peggy and Greg went to the same school. They had many of the same friends. One day, Peggy made fun of Greg's haircut. Greg turned red with embarrassment. Later that day, he decided to get even. He took some scissors, sneaked up behind Peggy, and cut off a big piece of her hair.
4. Anita and her one-year-old daughter had just left the house. Suddenly, two men appeared at the side of the car and opened the door. "Get out!" they shouted. "We're taking this car." Anita screamed, "My baby!" The men grabbed Anita, pulled her out of the car, jumped inside, and started to drive. Anita's arm was caught in the seat belt. She was dragged alongside the car. The driver wouldn't stop. He drove the car against a fence to knock Anita off, and she was killed. The men stopped, put the baby on the side of the road, and sped away. Four hours later, they were caught.

What Do Your Students Think?

1. What are the wrongs and injuries described?
2. Given the information you have, what do you think is a fair or proper response to the wrongs and injuries?
3. What purposes or goals are your responses designed to promote?
4. What additional information might help you decide on a fair or proper response? Why might this information be important?

Using the Lesson

Encourage your students to interview professionals who are responsible for dealing with wrongs and injuries, such as police officers, lawyers, judges, probation officers, or school principals. As well as asking the professionals to describe some situations that they have handled, the students can identify other wrongs and injuries and ask the professionals for ideas about how to best respond.

Intellectual Tool Chart for Corrective Justice Issues

Questions	Answers
1. What was the wrong, if any? What was the injury, if any?	
2. How serious was the wrong and/or injury? Consider: • *Extent*: How many people or things were affected? • *Duration*: How long did the wrongful or injurious conduct last? • *Impact*: How severe was the harm or damage? • *Offensiveness*: How objectionable was the wrongful conduct in terms of your sense of right and wrong, human dignity, or other values?	
3. How wrongful was the wrongdoer's conduct? Consider: • *State of mind*: Was the person's conduct intentional, reckless, or merely careless? Was the person aware of probable consequences? • *Justifications or excuses*: Was the person provoked, or were others partially responsible? Did the person lack control? Did the person have good motives?	
4. What is the wrongdoer's background and character? Consider: • *Past history*: Has the person committed similar wrongs in the past? • *Personality and character*: Is the person generally trustworthy, careful, nonviolent, and considerate of others' rights? • *Regret or remorse*: Is the person sorry for the conduct or indifferent about having committed the wrong or caused the injury?	
5. What type of response is needed? Consider whether to: • Inform • Overlook or ignore • Forgive or pardon • Punish • Require items to be restored • Require compensation or payment • Treat or educate	
6. What do you think the best response would be? Consider: • The goals of correction, prevention, and deterrence • The principle of proportionality (the punishment should fit the crime) • The values of distributive justice, human dignity, human life, freedom, practicality, revenge, and mercy Explain the reasons for your decision.	

Learning About Justice: A Latin American Experience

Teaching methods that overcome historic challenges to justice as an attainable goal

Ana Isabel Sanchez and Alberto Wray

This article will share some findings in teaching Latin American youth about justice through law-related education and demonstrate how LRE helps teach about justice in a realistic and meaningful way. It has been written with both sensitivity and caution so as not to unintentionally convey inaccurate information and create or strengthen some prevalent stereotypes. The article begins with a definition of justice based on the theory of John Rawls. It then provides an overview of Latin America and focuses on the Andean region to examine justice's role.

Latin Americans write poetry, sing, and actively demonstrate in favor of justice. Throughout the years, they have fought to obtain it. Because of external historic factors, sometimes justice was not achieved and therefore faded away. Because justice and injustice are very much a part of the Latin American experience, a legacy of disappointment and disenchantment has left citizens distrustful of the justice apparatus. Those who represented justice and enacted laws presumably to ensure it were out of touch with people's feelings about it. Moreover, in some Latin American countries, dictatorships and other nondemocratic government regimes abolished or manipulated the teaching of justice and related concepts in the school curriculum as a method to oppress citizens, control their participation, and avoid government criticism.

Justice as an Ideal Concept: Rawls

Black's Law Dictionary defines *justice* as "the proper administration of laws . . . the constant and perpetual disposition of legal matters or disputes to render every man his due." John Stuart Mill held that justice consists of respecting others' moral rights. When asked to explain the concept, a 10-year-old student said that justice was "the truth of truths, where no favoritism exists." Generally, people find it difficult to define a concept so filled with human rights, equality, and political and religious implications. When asked to do so, most resort to giving examples of unfair situations. Maybe the concept is best defined as obscenity is—we know it when we see it.

Justice is considered to be an essential democratic value requiring that people are treated fairly when distributing society's benefits and burdens, correcting wrongs and injuries, and making decisions. In *Theory of Justice*, Rawls says that orderly societies find their sustenance in the concept of justice as fairness. This fairness is constituted by principles that will be supported by a group of rational beings in a situation of initial equality. Only from that position will human beings be able to agree and decide in an unbiased fashion. This is more than a historic experience; it is an ideal imaginary "fairness" situation, which Rawls calls "original position." From this perspective, he formulates two fundamental principles of justice, which he believes will inevitably be chosen by those who gather at that original position. According to Rawls's equal maximum liberty principle:

a. Everyone has an equal right to the most extensive basic liberty compatible with a similar liberty for others.
b. The social and economic inequalities are arranged so that both provide (1) equality of opportunity for all and (2) maximum benefit for society's less-fortunate members (perceived to be to everyone's advantage).

According to Rawls, the basic idea of justice is the absence of arbitrary inequalities. Following his analysis,

Ana Isabel Sanchez is the program director for Latin America at the National Institute for Citizen Education in the Law, providing assistance in developing awareness about, and designing and implementing, LRE in Latin America. Alberto Wray is the director of the LRE program in Ecuador, a professor of law at the Catholic University of Ecuador, and an attorney in private practice.

Latin America is an area where there are generalized situations of injustice. Those viewing the problem from a radical viewpoint would say that there is institutionalized injustice because the majority finds itself in an unfavorable situation. Because of factors that are mostly historic, this majority has seen its "primary goods" diminished or, in the worst scenario, inaccessible. *Primary goods* are defined by Rawls as socially distributable goods, such as income and wealth or liberty and opportunity, that enable a person to serve individual interests and aims while choosing and guaranteeing the basis for self-respect. Rawls's principle of justice applies only to those societies capable of generating the goods necessary to make civil rights, self-respect, and political participation truly meaningful.

The Andean Situation

The reality is that Latin Americans live in societies with great social, economic, and political inequalities, thereby hampering the conditions that favor the exercise of equal rights and liberties of citizens. We can be considered a heterogeneous universe because of the multiplicity of diverse cultures in each country and even in each region within this Hispanic matrix. Generalizations about Latin America are impossible because of this immense ethnic mosaic and the infinite range of climates and landscapes. The following reflections about justice will be based on the Andean scenario, which is itself immensely varied.

The Andean region is composed of Argentina, Bolivia, Chile, Colombia, Ecuador, and Peru—six countries that, while highly diverse, have geographic, historic, and cultural ties as well as similar problems. The most outstanding is the difference between the region's two social sectors: one, the minority, clearly has an economic advantage, with access to all benefits and most modern conveniences, while the other, the majority, exists in poverty, between subemployment and absolute unemployment. Among those completely disfranchised is the

Focus on Six Andean Nations

Colombia's terrain runs from snow-capped peaks to hot lowland plains. Bogotá is its capital, and its official language is Spanish. Most of the nation's 35 million people live in the west. Colombia suffered prolonged periods of violence and civil war after gaining its independence from Spain in 1819, but it has had a tradition of democratic government, unlike many Latin-American nations. Many blacks, Indians, and Spaniards intermarried over the years, so that about 70 percent of the population are of mixed ancestry. Most of Colombia's small upper class is made up of Spanish descendants who are very closely knit and socialize mainly with each other.

Bolivia's land regions vary from snow-capped mountains to rain forests. The nation has two capitals—Sucre (official) and La Paz (actual)—as well as three official languages, including Spanish, Aymara, and Quechua. Since Bolivia became independent in 1825, it has had 16 constitutions. Most called for freely elected government officials, but dictators have often ruled. Most Bolivians are desperately poor, and many adults cannot read or write. Mestizos make up about 30 percent of the population, with about 60 percent of unmixed Indian ancestry and the rest of unmixed white ancestry. Intermarriage has made it difficult to define the classes by ancestry, and large numbers of mestizos belong to all classes. Most of the rich *elite*, the smallest social class, have had their wealth for generations. *Campesinos*, poor farmers who follow Indian ways, make up the largest social class.

Chile's Atacama Desert in the north is one of the world's driest places, while areas of the south are some of the rainiest. Chile's capital is Santiago, and the official language is Spanish. Since midcentury, Chilean poor have flooded into its cities, which today hold over four-fifths of the population. Except for a short period in 1973, the country has been ruled by democratic governments since it gained independence from Spain in 1818. Unlike in many other Latin-American countries, Chilean social classes are based chiefly on wealth, not ancestry. Still, those of European descent make up most of the small, rich upper class, with mestizos comprising most of the middle class, and most of Chile's Indians and poor mestizos making up the lower class.

Argentina's terrain includes snow-capped mountains, windswept plateaus, grassy plains, and forests. Its capital is Buenos Aires and its official language is Spanish. About 85 percent of its people are of Spanish or Italian descent. Mestizos comprise about 15 percent, and only a small fraction are Indians, most of whom live in isolated areas. Argentina's constitution of 1853 established it as a republic, but most of the time since 1930 it has been ruled by military dictators. Elected officials have led the government since 1983.

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SOUTH
AMERICA

Ecuador is a small coastline nation whose land regions range from coastal lowlands to snow-capped peaks. Its capital is Quito and its official language is Spanish. Ecuador has had more than 15 constitutions since it gained independence from Spain in 1830. Since 1979, it has been governed by elected officials. About 10 percent of the people—mostly of European ancestry—make up the wealthiest and most powerful group, while Indians and mestizos each make up about 40 percent, and blacks, about 10 percent. Most mestizos and blacks rank far below the whites in wealth and importance, while the Indians have almost no power or money and little contact with the other peoples.

Peru's official languages are Spanish and Quechua, and its capital is Lima. Its terrain is enormously varied, consisting of desert along the coast and Andean peaks running north and south along the entire nation. Peru has had 12 constitutions, each declaring the nation a democratic republic, since it gained independence from Spain in 1821. Yet, dictators have ruled many times. Although Peru's middle class of whites and mestizos has been developing since about 1900, its small upper class consists almost entirely of whites. Nearly all the Indians are poor and uneducated.

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indigenous population, which in Bolivia, Ecuador, and Peru reaches over 20 percent of the population.

The region presents a situation where the mere distinction between the poor and rich is insufficient because the difference is more than just quantitative. Two decades ago, Osvaldo Hurtado, political scientist and expresident of Ecuador, used to talk about the existence of "two superimposed worlds" in order to describe this dynamic. Academics have referred to it as *marginalidad* in order to suggest the lack of majority participation in their countries' economic, political, and cultural affairs.

The coexistence of these two worlds, each operating in accordance with its own dynamics and governed by its own laws, is easily traced to the Spanish conquest. Spanish colonial laws even formally established the "Indian republic," as opposed to the conquistador society. Inequality was justified by explaining its protective purposes, but the extremes it produced soon generated doubts about its legitimacy. With independence, formal distinctions disappeared and the principle of equality before the laws was proclaimed. Nonetheless, access to essential goods still remained in the hands of the few. Thus, cultural and economic injustice persisted.

In these countries, justice has been debated and analyzed by intellectuals and aspired to by community leaders in their revolts. It continues to be the professed common aspiration across the Andean region. The word *justice* pervades its legal codes and laws. It is a concept that has been interwoven into the jurisprudence as the goal that should always drive citizens. It permeates not only the legislature, law schools, and courtrooms but overflows into everyday life.

Artistic Expressions of Justice

Some say a culture's literature, songs, and other artistic expressions clearly demonstrate its needs, concerns, and beliefs. The amount of Latin American art devoted to themes of justice or injustice can be considered public expressions of citizens who are striving to achieve justice, to protest against and denounce a system that fosters injustice, and to forcefully demand justice when it is taken away. These are classic and recurring themes in Latin American authors such as Augusto Roa Bastos in *Yo el supremo*, Miguel Angel Asturias in *El Señor Presidente*, Benedetti's poetry, and any of the works of Arguedas, Jorge Icaza, and Eduardo Galeano. All these will provide the reader with a touching and realistic notion of what justice means for the Latin American community. With their masterpieces, painters like Osvaldo Guayasamin and Diego Rivera have vividly denounced the oppression and injustice experienced in their countries, capturing the face of fear, injustice, and sorrow with colors that create a certain atmosphere of cruelty, oppression, and suffering, thereby reflecting the injustices and miseries that people face every day.

The Latin American obsession with justice is the result of its lack, as if the daily injustice acquires a didactic function, allowing the achievement of justice to be the valued ideal. Notions of justice and injustice are ever-present reminders of this phenomenon's significance to Latin American reality.

Justice as a Foreign Concept

From its beginnings, the law's mission has been to search for justice in order to balance and discipline people's wishes and needs by pointing out their rights and responsibilities. Nowadays, the Latin American justice apparatus has obvious imperfections that cannot be hidden. The administration of justice is seen as a slow and costly process, offering solutions that are deemed dysfunctional for fulfilling the population's immediate needs, particularly for those of low income. The justice system has been discredited, and, as a result, in many communities, it does not play a prominent role. In some cultures, specifically among certain groups, justice problems are resolved by practices that the law does not recognize. Most important, these defects not only hamper the judicial system but also the influence of democratic values within these societies—not only because the lack of effective judicial means creates an atmosphere prone to violence, but because the way in which the problems are finally resolved fosters the community belief that justice is a foreign concept.

Latin American LRE

After evaluating Rawls's theory and acknowledging the ever-present sense of injustice in Latin America, it shouldn't be surprising that educating about justice there can evoke a sense of shock, disbelief, apathy, and outright cynicism. But, at the same time, the need for this type of education is indispensable and urgent. LRE has been used in Latin America as a means to bring change in order to achieve justice. It helps distinguish between justice as a goal and the instruments that have been officially established to achieve it.

LRE programs in the Andean countries have felt the burden and consequences of its historical inheritance, giving way to important differences when compared to similar efforts in the United States. As in the rest of Latin America, this region's democratic life has been interrupted in an almost cyclical manner by dictatorships ordinarily imposed by the military. The population frequently compares the advantages and disadvantages of such regimes. The arbitrariness of dictatorships is often mitigated by their capacity to resolve problems. On the other hand, democracy offers its citizens liberty and integrity, but with an inefficient process for introducing changes that will benefit the majority. Based on recent studies conducted in Ecuador, almost 57 percent of that nation's population believes that a dictatorship could efficiently face the task of introducing radical changes in order to guarantee a fair system for the majority. The same study places the congress and the courts among those organizations that citizens distrust most.

Within this context, promoting the acquisition of knowledge about the

(continued on page 31)

Teaching Strategy

"With Liberty and Justice for All . . ."

Ana Isabel Sanchez

Objectives

At the end of this lesson, students will be able to

1. Recognize what they believe to be justice's components and guidelines and use these to devise a definition that represents their personal interpretation of this abstract concept.
2. Be in a position to promote justice and fair outcomes by being able to discern issues of justice and injustice as these arise in their daily lives.
3. Understand how justice implies certain attitudes and behaviors.
4. Explore personal values and interests that have an impact on opinions about justice.

Grade Levels: 5-7

Materials

1. Student handouts: "United Nations Universal Declaration of Human Rights" and "Role-Play Scenarios"
2. Other teacher-provided documents that show a commitment to the pursuit of justice, such as the U.S. Constitution, the San Jose Pact, or Amnesty International reports.
3. Student-provided articles or photos that demonstrate instances of justice or injustice.

Time: 2-3 days

Resource Person's Note

If a resource person is not available for this entire lesson, the teacher can begin by sharing "Background Information and Preparation" and "Activity Preparation Phase" with the class. On the second or third day, the resource person will be exceptionally useful in presenting "Application: Making a Just Decision" by explaining to the students how issues such as role-play scenarios IV. and V. get to court, and how existing laws affect court decisions. For example, an affirmative action plan to compensate minorities for past discrimination may be in place at the business in IV., and the landlord's plans for rehabbing the apartment building in V. may be in violation of the intent of a tenant protection law. Particular laws may be applied throughout the debriefing session.

Procedures

I. *Background Information and Preparation*

In order to provide a thorough and detailed explanation of justice, the teacher may wish to spend some time explaining the three categories of justice.

A. *Distributive justice:* Fairness issues involving the distribution of burdens as well as benefits among the members of a group.

B. *Corrective justice:* Fairness issues involved in responding to a wrong or injury.

C. *Procedural justice:* Fairness issues involving how a decision is made and how the information was gathered in order to make that decision.

II. *Activity Preparation Phase*

A. The teacher begins the lesson by asking students to bring in a newspaper or magazine article or picture that demonstrates a just or unjust situation. The teacher should emphasize that the situations should represent the students' own views of what is just or unjust, which may not be the same as those of their parents or the media, for example.

B. The teacher will divide the students into groups of four to share their articles or pictures and arrive at a group decision about whether the justice and injustice situations have any similarities.

C. If the teacher has discussed distributive, corrective, and procedural justice, the students can be asked to group their articles under these subheadings. If not, students should be given other categories under which to group their articles, such as violated interests or rights, or the relationships involved (for example, family, abuse of authority, interstate or international injustice).

D. Each group will choose the situation that they find the most unfair and explain why. As appropriate during this discussion, teachers should feel free to incorporate examples of injustice found in literature, science, history, or other subject areas.

E. Students will now try to brainstorm a definition of justice. The teacher will write their responses on the board and use their own words to mount a working definition. (Stick-on notes are useful in arranging and rearranging the words until the working definition is complete.) The students must agree on a final version of their definition before they proceed to the next step in the lesson.

F. The teacher will ask the students to compare and contrast their own definition of justice with what they find in a document such as the Universal Declaration of Rights or the U.S. Constitution. How broad or narrow is justice's definition in the document? Why do the students suppose the document's drafters defined justice this way? As an alternative, students can role-play how they, as the document's drafters, determined how they would define justice.

III. *Application: Making a Just Decision*

A. Role playing: Divide students into five groups. Hand out "Role-Play Scenarios" and assign one scenario to each group. Ask the groups to discuss their scenarios and role-play their solutions for the class.

Note: While doing this activity, you may find that students have a clear idea of what justice is but have difficulty understanding its application. If so, go back to the original newspaper articles or pictures and ask the students to identify which situations involve a lack of understanding about what justice is and which involve a misapplication of justice.

B. Debriefing

1. Ask students what interests and values they were considering when they decided what positions to take.
2. Do they know of any guidelines to follow when making a fair decision?
3. Do they know of any other ways their situation could have been resolved, with a more favorable outcome?

United Nations Universal Declaration of Human Rights

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,
The General Assembly
proclaims this

Universal Declaration of Human Rights as a common standard of achievement for all peoples and nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Note: The United Nations adopted the Universal Declaration of Human Rights on December 10, 1948. This document identifies basic civil, economic, political, and social rights and freedoms of every individual. Meant to serve "as a common standard of achievement for all peoples and all nations," it recognizes that every person is born free, with inherent dignity and inalienable rights. The declaration contains 30 articles identifying many human rights and freedoms including the right to equality, property ownership, and education, as well as freedom from slavery, torture, arbitrary arrest, and interference with privacy, family, and home.

Oops, we goofed! In our article "What Citizens Can Do: A Case Study in Environmental Activism" in the fall issue, we inadvertently described the estimated particulate matter emissions of Los Angeles as "110 tons per *year*" instead of "110 tons per *day*." Fortunately, we did not make those kinds of proofreading blunders during our major environmental battles.

Mike Williams

Latin American Experience

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law hardly contributes to strengthening civic culture. Instead, LRE's objectives and methods have been necessarily reformulated to accommodate the concept of justice that is deeply rooted in the citizen's consciousness. Public legal education is the Latin American version of LRE. By training teachers, working with students, and developing curriculum materials, public legal professionals have been able to provide situations and activities pertinent to developing individual values. The move from concept to action should be the main goal in teaching about justice, and public legal education assists in converting the notion of teaching justice from a mere euphemism to a realistic and meaningful goal.

The words *what, why, when*, and *how* capture the essence of teaching about justice in the complex reality that is Latin America. *What to teach?* Teaching about the concept of justice is insufficient; one must allow the students to discover the tools that will help them achieve their ideal. The lessons are designed to convince the students that, with their individual actions and active participation as citizens, not only will they lead a democratic life, but they will also help transform their society into a fair one. Public legal education assists in the critical evaluation of the instruments legally established in order to facilitate justice. As a result, students are able to evaluate these instruments' effectiveness and to seek legal avenues for change in order to reclaim justice. Emphasis is placed on the modalities of change and on democracy as the tool to provide the impetus for, and to channel, the change.

Why teach about justice? After all, the legal apparatus maintains and strengthens injustice. Following is a list of values considered to be the pillars of the Latin American educational system: intellectual curiosity, participation, decision making, tolerance, search for truth, value for human life, *justice*, and equality. The teachers participating in the public legal education movement try to make viewing a road toward justice possible for their society. Their students believe in justice as a principle; the problem is with the system. They view their leaders as not adjusting themselves to standards of fairness. But, even though democracy as a political regime has its problems and weaknesses, it still prevails, and schools are trying to offer students a democratic environment where they can express their ideas.

Where to teach about justice? Programs in the Andean region had to expand from schools into communities and other settings, including adult evening programs, group homes, community establishments, and correctional institutions. *How to teach about justice?* The programs mainly use LRE participatory methodology. Otherwise, the approach depends on many factors, such as available resources, mandated requirements, teachers' backgrounds, and curriculum guides.

Role-Play Scenarios

I. Athletics or the Arts?

You are the principal of a school that has traditionally been famous for developing great athletes who perform brilliantly in interscholastic sports events. This year, you have decided that you want the school to start developing an excellent reputation for its performance in art and oratory contests. In the existing budget, there is funding available to hire only one new teacher. While 72 percent of the students want you to hire a sports coach, your teachers support using the money to hire a new arts and oratory teacher. Should you hire a teacher or a coach?

II. Child Care or Medical Care?

You are the mayor of your city, which hasn't enough child-care centers to serve the needs of your constituency. Budget constraints are forcing you to decide whether to cut Medicare and other social welfare benefits in order to have the funds to subsidize more child-care centers. What do you decide to do?

III. Grandparent or Grandchild?

You are a medical emergency room doctor. An elderly person is rushed in with a massive heart attack at the same time as a child with an intestinal blockage. Both may die without immediate attention, but your small staff cannot attend to each at the same time. Which patient will get immediate treatment?

IV. Which Good Solution?

You are an employer whose company has had difficulty filling the "minority gap." You need to hire a new supervisor, and there are only two qualified applicants. One is an average minority worker, while the other is an exceptional nonminority worker. Who gets the job?

V. Move Out, or Stay Put?

You are a judge. The case before you involves a landlord who wants to tear down his rundown apartment building, renovate it, and sell the new units as condos to a high-income group. This will necessitate throwing out the minority tenants, who will have difficulty finding affordable housing nearby. What is your decision?

DEBATE

Juvenile Court Abolition

A look at a theory of children's rights that accommodates notions of power

Katherine Hunt Federle

To argue for the abolition of a juvenile court system that recognizes children's needs seems counterintuitive. After all, we claim that we have a special obligation to protect and nurture children and that, with the appropriate guidance and treatment, they will become productive members of society when they reach maturity. But what is so appealing to us about the juvenile court is precisely why it should be abolished: its paternalistic underpinnings are fundamentally inconsistent with a coherent account of children's rights.

Children are society's most powerless group. Has the juvenile court's paternalism historically benefitted or further marginalized them?

UPI/BETTMANN

Why should a concern for children's rights mandate the juvenile court's abolition? Certainly, within the American legal tradition, rights play a crucial role in articulating the relationship between the state and the individual. Rights delineate a sphere of personal autonomy and recognize the individual's power to demand freedom from state interference. Concomitantly, rights limit governmental power over the individual and compel the state to respect each citizen. Thus, to have a right is to have the power to compel the state to acknowledge and value individual freedoms.

Tying rights to power has several important consequences. First, to have a right is to have power; thus, to be a rights holder in our society is to be a powerful individual who commands respect and whose claims are taken seriously. The corollary, of course, is that, without rights, one has no power and, without power, one is neither respected nor taken seriously. Consider, for example, the problems women and African Americans encountered in this country when they claimed that they were entitled to the same constitutional protections accorded white men. In this sense, power can be exclusive: it suggests someone else is powerless, thereby reinforcing existing hierarchies and perpetuating inequality.

A Coherent Rights Theory

Any coherent rights theory must recognize the connection among power, respect, and inequality, allowing the most powerless to have rights. We would value and respect these members of society as rights holders and would recognize and hear their claims. In turn, making these claims would challenge existing hierarchies and expose inequalities.

As currently constructed, however, Western rights theories rest on notions that are unnecessarily hierarchical and that disadvantage those who most need recourse to rights. These accounts require of the individual a certain degree of competency as a prerequisite to having and exercising rights. Historically, the consequence of tying capacity to rights has been to exclude women and minorities from the category of rights hold-

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Katherine Hunt Federle is an associate professor of law at Tulane Law School in New Orleans and chair of the American Bar Association Family Law Section Law Committee on Juvenile Law and the Unmet Needs of Children.

DEBATE

In Defense of Juvenile Court

An argument for leadership in helping troubled youth succeed

Frank Kopecky

The juvenile court as an institution is almost one hundred years old. The first juvenile court in the world opened its doors in Chicago in 1899. It developed as a part of the package of reforms known in history as the Progressive Movement. Progressives felt that government had the responsibility to protect and help the citizen and that there was a need for an alternative to the punitive and insensitive criminal justice system's treatment of children and families. They proposed a court that would be sensitive to the needs of children and families. Rehabilitation was to be the primary objective of juvenile justice. Jane Addams and Clarence Darrow were among the many prominent individuals who played a role in developing this first juvenile court. Jane Addams was the director of Hull House, a famous settlement house of the time, and one of the founders of the social work profession. Clarence Darrow was perhaps America's most famous trial lawyer.

Within twenty years, virtually every state in the country and many foreign nations had developed a juvenile court similar to the one founded in Illinois. Roscoe Pound, legal scholar and dean of Harvard Law School, proclaimed the establishment of the juvenile court as one of the most significant advances in the administration of justice since the Magna Carta. Yet, today, the very

Frank Kopecky is professor of legal studies at Sangamon State University in Springfield, Illinois, and editor of the Illinois State Bar Association Law-Related Education Newsletter.

Jane Addams (1860-1935), **(above)**, ***was the American social worker and humanitarian who established Hull House in Chicago, the most famous U.S. settlement house, which served as a neighborhood center for Chicago immigrants. Reform-minded residents organized the first U.S. juvenile court in 1899 with the help of prominent social reformers including Clarence Darrow, (right) the most famous criminal defense attorney of the times. Use this and other information about Addams and Darrow as a springboard into an enrichment activity where students compare immigrant conditions during "their" turn of the century with those of the last one, and government or individual interventions to assist immigrants in their struggle against poverty.***

existence of the juvenile court is being questioned. Have times changed so much and have the juvenile courts operated so poorly that they are no longer needed? I continue to believe that a juvenile court is still needed and that, while social conditions are certainly different from what they were a hundred years ago, there is still a need for a special process to examine children's criminal misconduct and family disputes.

Two Sources of Criticism

Criticism of the juvenile courts comes from two main sources. It is ironic that they are attacked, on one hand, by people who believe the court protects young people too much and, on the other, by those who believe the court protects youth too little. First, there are those who question the emphasis on rehabilitation. They see the juvenile court as too soft on criminals. They argue that a more punitive approach will increase the accountability of youth and deter future criminal activity. Certainly, the increase in violent juvenile crime has given these arguments increased public support. The second group contends that the informal procedures used at certain points in the process do not adequately protect the rights of children and families. They also attack the juvenile court because they feel its helping philosophy will lead to excessive intervention.

Children's Special Needs

As for all courts, the primary purpose of the juvenile courts is to resolve disputes. There are three basic types: delinquency cases involving criminal misbehavior, neglect cases raising questions about a child's care, and status offenses involving inappropriate but not criminal behavior such as running away or truancy. In all these instances, the court plays its traditional role in determining whether the alleged conduct actually occurred and establishing a remedy or consequence for the behavior. The question that must be answered in determining whether the juvenile court should continue to exist is whether there is a need for a separate tribunal to hear these disputes.

The juvenile court's philosophy recognizes that children are not just little adults and that they have needs as well as rights. The court must consider the child's age, maturity, and dependence upon others, usually a family, for basic care. Minors must be held accountable for their actions, but the degree of accountability and the nature of punishment must be consistent with the development stage. We need a separate court for much the same reason that we have grade levels in our school systems. One does not teach a junior high school student using college classroom methods.

Rehabilitation and Court Goals

The court's primary focus is on rehabilitation rather than retribution or deterrence. The community's right to public safety as well as its duty to teach and establish responsible behavior must also be balanced into the equation. Each case has to be thoroughly examined not only from the perspective of determining what the child did but what should be done for the child. There are four basic and interrelated goals of the juvenile court system: separation, confidentiality, individualized justice, and community corrections.

Separation

Separation is the most important goal. The physical separation of juveniles from adult offenders by the use of separate detention facilities, courtrooms, and correctional institutions is important because it keeps young offenders from coming into contact with older offenders and helps to minimize stigma and labeling. Separation also allows for a separate decision-making process to be used and a separate staff to be hired and trained.

From the juvenile judge to probation and detention workers committed to the goals of juvenile justice, the existence of a dedicated staff is vital to the success of a juvenile justice system. Furthermore, there is a need for a court that uses a procedure different from the adversary process of adult criminal court. The court's purpose is not only to determine whether the child is guilty of an offense but to provide a mechanism for screening cases prior to the hearing and for monitoring cases following the hearing. Diversion and referral to services are trademarks of juvenile justice. Police are authorized to engage in informal dispositions such as restitution or community service. This informal handling of the dispute may resolve the matter without actually going to court.

Confidentiality

Confidentiality furthers the system's rehabilitation goals and reinforces the separate procedure used. Because of their age and immaturity, youth are considered less than fully accountable for their actions. It is unfair to give them a criminal record that will be another strike against them in their efforts to grow into responsible citizens. Under most juvenile court acts, youth are not considered to have been criminally convicted, allowing them to honestly answer no to questions about a criminal record.

Confidentiality does not mean that there is no accountability. Under most juvenile codes, if a youth is accused of future criminal activity, it is the general public that is precluded from knowing of the youth's criminal behavior, not law enforcement or court officials. Additionally, by keeping the behavior confidential, there is no official labeling, which avoids stigmatizing the youth and should help foster the positive self-image that is important from a developmental standpoint. Youth crime research shows that, while most youth engage in some delinquent behavior, most will mature out of a crime pattern.

Individualized Justice

To assure individualized justice, police, probation officers, and others in the system are granted a great deal of discretion over a case's outcome. A complete social history is to be made early in the case, including not only information about the offense and past offenses, but family education and other information. A case plan is to be made involving the parents and other community resources. Where appropriate, victims are contacted and mediation attempted. A disposition should be planned that holds the youth accountable for actions but also allows the development of sound social skills.

Community Corrections

Finally, the juvenile court emphasizes community corrections. A probation office is the primary correctional tool. Its staff gathers information about the youth, develops a case plan, and monitors the youth's behavior. This office also serves as an advocate for the youth, attempting to provide services such as education or job training. Additionally, in many communities, the juvenile court can provide leadership in the development and coordination of youth services.

A Look at the Adult System

Adult correctional systems also are committed to these goals; and, if the juvenile court is abolished, it is possible that efforts to attain them will continue. But a separate trained and experienced staff will not be available to provide the leadership in program development and goal implementation. The adult system's punitive philosophy will overcome efforts to rehabilitate, and confidentiality will be lost. Additionally, in adult criminal procedure, efforts to develop a case plan occur at the end, not at the beginning, of the process. There is less emphasis on diversion and informal settlement. Today, it is popular to promote mediation and arbitration as alternative dispute resolution techniques. Used in juvenile court for almost a hundred years, these techniques will not survive if the juvenile court is abolished.

Juvenile System Improvements

No justice system is perfect, and the juvenile justice system has its faults. The ability to use discretion opens the doors for abuse. This is particularly true when intervention is put forth in terms of helping rather than punishment. However, the juvenile justice system is not static and, over the last 30 years, changes have occurred that eliminated many of these difficulties.

First, as a result of court cases and legislative changes, juveniles are given most of the procedural rights found in adult practice. Since the Supreme Court ruled in the landmark Gerald Gault case that constitutional rights are not for adults alone, juvenile court acts provide for an adjudicatory hearing that is similar to an adult criminal trial. The only two constitutional rights that the courts have not afforded juveniles are the rights to bail and to a jury, but several states even provide these.

Additionally, there has been a major effort to reduce the number of status offenders brought into the formal court process. These youth are being diverted to youth service agencies, runaway centers, and truancy programs. The key to assuring the success of all these changes is the availability of attorneys and other youth advocates who can advise them of their rights under the juvenile court act and the alternative processes and services available to them.

Misplaced Criticism

Much of the juvenile court criticism is misplaced, and abolition would be a mistake. Juvenile courts have become society's scapegoat, being asked to solve problems beyond their control. Is it the juvenile court's fault that poverty is increasing in this country, that jobs for youth are scarce, or that families are less stable? Blaming it for all these wrongs may accommodate politician's needs, but it will not solve the crime problem. Additionally, juvenile courts have never been adequately funded to do what they are supposed to do. Over the years, they have promised much more than they were able to deliver. More reasonable expectations are needed.

To argue that the adult system is significantly better either at preventing crime or protecting rights is false. There is only a minimal connection between imprisonment rates and crime level in our society. Our sentences are longer, and we have more people in prison than virtually any other place in the world; yet, we still have one of the higher crime rates. The crime rate for juveniles has furthermore not increased so rapidly as is generally perceived in the media. In the last few years, what has increased is the amount of violence by both juveniles and adult offenders. Our schools and communities are becoming armed camps. But is this the juvenile court's fault, or are misplaced drug policies and the lack of any real firearm regulations to blame?

LRE Award Deadline Announced

The American Lawyer's Auxiliary has announced that entries for the Law-Related Education Teacher of the Year Award must be postmarked no later than May 1, 1994, for all three categories: elementary (1-5), middle/junior high (6-9), and high school (10-12). Each year, the awards honor those teachers who have demonstrated excellence in the LRE field. For more information, contact Law-Related Education Teacher of the Year Committee, 750 N. Lake Shore Dr., Chicago, IL 60611, 312/988-6387.

Changing juvenile laws by lowering the age of criminal accountability will not solve the crime problem. Crime rates in New York, which requires adult sentencing at 16, are much the same as in Illinois and Massachusetts, which use 17, and California and Wisconsin, which use 18. There is even research that supports the contention that young people may actually be given a more certain and longer sentence in juvenile than adult court. A 17-year-old who may have exhausted the patience of the juvenile system is a first offender in the criminal system. Caseload pressures in the adult system often lead to lenient plea bargains.

Additionally, it is hard to take seriously an argument that, somehow, the criminal courts are better equipped to protect minors' rights. Recent studies point out the criminal justice system's woeful lack of public defender services funding. Prosecutorial resources, adult probation services, and correctional resources are also in short supply. Minorities find themselves disproportionately represented in both the adult and juvenile system. In capital punishment cases, the accused is afforded almost endless rights; yet, minorities are disproportionally represented. Giving persons more procedural rights will not solve these problems, which stem from historic discrimination patterns and institutional racism that are beyond the control of either the criminal or the juvenile justice systems.

Community Commitment to Success

As we approach the juvenile court's centennial, the answer is not to abolish but to renew our commitment to its goals—and to make it work. Reforms are not implemented overnight. While separation has always been a juvenile justice goal, Illinois, where the juvenile court began, is only now completing a project to remove juveniles from jails, with adequate detention facilities being developed to serve most areas. There is always a risk that these will be overused; but, by having a group who believe in the diversion philosophy of juvenile justice, this risk will be minimized.

The juvenile court is one small part in what must be a community commitment to develop a system that helps youth mature into responsible adults. It can be an important part, however, providing the leadership necessary to help our troubled youth succeed. Making the juvenile court work will be a challenge, but we owe it to our youth not to give up. □

Juvenile Court Abolition

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ers until they were able to shift the dialogue beyond arguments about their competence. But, even today, the confining effect of a rights theory tied to capacity makes conceptualizing rights for certain groups extremely difficult. The mentally disabled, for example, cannot claim they have the requisite capacity to have and exercise rights.

Theories of Children's Rights

Defining rights holders as free beings who have the necessary capacity to possess and exercise rights makes conceptualizing children as rights holders extremely difficult. The debate over children's rights, therefore, has centered on whether children are competent rather than on a critical examination of the centrality of capacity to rights theory. This poses certain difficulties for children's rights proponents who find themselves defending a position for which there is no solid empirical evidence. Thus, for every definitive claim that children do have capacity, there is an equally compelling one that they do not. But this emphasis on children's competencies has obfuscated the meaning and significance of having rights and has channeled our rights talk in ways that reinforce existing power relationships between children and the state.

A coherent children's rights theory must accommodate notions of power. Under such an account, the child's powerlessness is central to the determination of status as a rights holder. By extending rights to children, we are compelling the state to respect and value them, to hear their claims, and to take these seriously. In turn, the process of making claims can alter existing hierarchies and challenge status. In this sense, then, rights are inclusive, for they require that we respect the marginalized and empower the powerless.

Some children's rights theorists, however, argue that we should define children's rights in terms of their interests and needs. Under this account, a child may have a "right" to be cared for and nurtured, and this interest may be so important that it overrides the child's other rights, like that of autonomy. Thinking about rights in this sense, however, fails to remedy the children's powerlessness. When these theorists characterize rights as needs, they are attempting to justify the choices adults make for children; but these choices spring from paternalistic considerations that have little to do with the empowerment of children. Nor can it be argued that children positively benefit from this account of rights, for our attempts to protect children have had bad results, particularly in the juvenile court.

Paternalism and Discrimination

Deinstitutionalization patterns for status offenders in the juvenile court, for example, suggest that paternalistic concerns may mask sexist and racist attitudes. Historically, noncriminal status offenses (like running away, violating curfews, truancy, and "waywardness") have comprised a larger percentage of girls' than boys' arrests; similarly, detention for a status offense has been far more likely if the offender was female. Deinstitutionalization, however, appears to have benefitted boys rather than girls; although the number of girls placed in public facilities has declined, there is increasing evidence that more girls are being detained in secure private facilities for nondelinquent offenses, often defined in terms of the girl's sexual behavior or her obedience to authority. This different treatment experienced by girls suggests the court's implicit interest in monitoring girls' sexual activity and demanding obedience to parental authority, and it reveals the juvenile court's gendered nature.

Similarly, deinstitutionalization reforms have had little positive impact on the incarceration of minority youth. Of course, before deinstitutionalization, most children arrested for status offenses were white; this pattern has continued even after the implementation of deinstitutionalization reforms. But, interestingly, deinstitutionalization did not reduce the number of minority children arrested for status offenses; in fact, the arrest rate for minority status offenders has increased, while the rate for white youths has declined. Simultaneously, there have been dramatic increases in minority populations in public juvenile correctional facilities that cannot be accounted for by the increase in status offense arrests or by an increasing arrest rate for serious delinquent offenses. Given that the majority of children placed in private facilities are white, this trend is particularly disturbing because it suggests a pervasive and systemic racial bias.

Sentencing in the Juvenile Court

These institutionalization patterns for girls and minority youth also raise questions about the degree of discretionary decision making accorded judges in the juvenile justice system. Certainly, one of the juvenile court's aims is to develop a treatment program tailored to the individual child's needs and interests. But the juvenile court's emphasis on the child's best interests implies that a number of factors about the child are relevant to the dispositional hearing. This raises a concern about the degree to which social characteristics, like the child's race and sex, influence the sentencing decision. Several studies have concluded that a system of individualized justice does create racial disparities in the dispositional phase, which, in part, may explain the disproportionate incarceration of children of color.

Many juvenile court practices, however, directly contradict the premise of individualized justice. In some juvenile courts, for example, treatment-oriented dispositions are being supplanted by more punitive sentencing schemes. Several states have redefined their juvenile courts' goals to include protection of the public and the punishment, rather than the treatment, of juvenile offenders. Many of these same states have implemented determinate and mandatory sentencing schemes, essentially displacing the juvenile court's individualized sentencing structure. But, even in those courts without determinate sentences, judges often consider the seriousness of the offense and the child's prior record when structuring an appropriate disposition.

Procedural Informalities and Limited Constitutional Application

Juvenile dispositions' increasing punitiveness also challenges another underlying juvenile court premise: that children should be treated differently because of their youth and immaturity. That distinction is critical, for it has been used to justify the juvenile court's procedural informality and the limited application of the Constitution to juvenile proceedings. But, as children are treated more punitively, can the state deny them the same protections afforded adults? Several state courts have answered yes by rejecting challenges to the denial of a right to a jury trial in a delinquency proceeding. For these courts, children accused of delinquent acts are not entitled to jury trials, although they may be punished for their actions.

But, even within a treatment-oriented court, procedural informality does not encourage the assiduous enforcement of those rights children do have. In a delinquency proceeding, for example, the state must prove beyond a reasonable doubt that the child committed an illegal act. Feeling that it is better to err on the side of intervention, however, many judges will enter a finding of delinquency even though the state may not have satisfied its burden of proof. Additionally, although children are entitled to an attorney in a delinquency proceeding, many are unrepresented by counsel for a variety of reasons, including possible judicial hostility to child advocates and uninformed waivers of the right to counsel. Attorneys themselves may be unclear about their roles and responsibilities as child representatives and may act more like friends of the court than zealous advocates.

Breaches of Confidentiality

Lastly, other practices contradict the juvenile court's premises of confidentiality and benevolent treatment. Juvenile court judges, for example, are more willing to use their contempt power to punish status offenders for failing to obey court orders. Consequently, these children are treated like delinquents and may be incarcerated, although their original referrals were for noncriminal acts. Additionally, many states breach the juvenile court's confidentiality by permitting law enforcement officials, under certain circumstances, to use fingerprints and photographs obtained during an individual's minority. Other jurisdictions allow a criminal court to consider an individual's prior juvenile record for the purposes of bail, impeachment, or sentencing.

Children and the State

These practices suggest that the juvenile court is no longer the institution envisioned by the Progressive reformers. Certainly, the increasing punitiveness of the juvenile court contradicts the premise of a rehabilitative and reformative institution. But the juvenile court should be abolished even if the court returned to its paternalistic beginnings. Allowing the state to act paternalistically gives it tremendous power that often disadvantages children. And this raises questions about the appropriate relationship between children and the state.

Our legal system rests on some fundamental assumptions about the importance of rights. We are skeptical of state power and circumscribe it by requiring the state to recognize and respect individuals through the exercise of their rights. By tying rights to concepts of power, we also recognize that rights should be inclusive, that the powerless and the marginalized have the greatest need to be protected from the unfettered exercise of governmental power. Children are the most powerless group in our society, and they will remain marginalized if we continue to speak about their rights in terms of their needs. We must reconstruct children's rights to accommodate notions of power; the first step in that endeavor should be to abolish the juvenile court. □

Four Nations' Juvenile Justice Systems: A Comparison

Shelly Gordy

Juvenile court was created as a separate justice system in order to minimize the adult criminal system's harsh penalties. While virtually every country, recognizing that youth are not fully accountable for their criminal offenses, has developed a separate juvenile justice system, comparisons are difficult because of differing legal traditions, political systems, and social values. Illustrated here will be the differences and similarities of the juvenile justice systems of the United States, Japan, France, and Canada, including the age of criminal accountability, the extent to which the system emphasizes treatment rather than punishment, and the judges' qualifications.

Information is necessarily generalized per country. There are important aspects of juvenile justice that vary from state to state, province to province, and even from rural to urban areas. The systems of France and Japan are likely to be more consistent because they have a unitary political system. As nations with federal systems, the United States and Canada have considerable variations among states and provinces. Canada at least has a national juvenile court act by having adopted the *Young Offenders Act* in 1984, but each province has implemented this law somewhat differently.

Juvenile Classification

In the United States, most states use 18 as the upper age limit of juvenile court authority. This age is lower in a few states. New York, for example, uses 16—the lowest of any state—and a few states, including Illinois and Massachusetts, use 17. Youth who have not reached this age are considered juveniles. However, after juveniles are found delinquent, courts may maintain control of them until they turn 21. U.S. juvenile offenders are placed into two groups. *Delinquents* are those who commit acts for which an adult would be punished. *People in Need of Service* (PINS) are unmanageable, or they have engaged in behavior such as truancy.

Japanese juveniles are those who are under 20, and its juvenile justice system places offenders into three groups. The first consists of juveniles 14-20 who engage in criminal acts or otherwise violate laws. The second group, children under 14 who commit crimes, are treated under the child welfare system. The third group is for pre-offense juveniles—those who have not committed any crime but are likely to. Examples are children who have discipline problems, stay away from home, associate with criminals, or engage in acts detrimental to moral character.

Both France and Canada have less-complex juvenile classification systems. They simply regard those under 18 as juveniles and those over this age as adults. The passage of the *Young Offenders Act* eliminated variations in ages among the Canadian provinces.

Treatment and Punishment

In the United States, juvenile courts were originally established with a treatment rather than a punishment philosophy. While treatment is still emphasized, there is a trend toward the greater use of punishment. Probation and community corrections strategies such as home detention, community service, and restitution are still the more frequently found intervention forms. Through the *Juvenile Justice and Delinquency Prevention Act*, the federal government has also encouraged states to limit court intervention over noncriminal behavior (PINS) as well as the use of jails for holding youth charged with delinquent acts. Nevertheless, many states have added punitive measures by lowering the age of criminal accountability and by making serious offenses committed by youth over a certain age (usually 13-15) subject to criminal court trial. There has further been an increased use of fixed sentences; and, unlike in most countries, a few states even authorize capital punishment for 16- and 17-year-olds; the Supreme Court has found this constitutional.

The Japanese system directs all juvenile cases to the family court. Its philosophy is that the adjustment of the family situation is an absolute prerequisite for children's protection and delinquency's prevention. Actions taken by the court against a juvenile offender are geared toward protection, education, and treatment. Generally, most hearings are held informally, with no press or public allowed. However, serious juvenile offenders ages 16-20 are sent to the district courts for prosecution and may face criminal punishments similar to those of adults. Because the Japanese system is strongly oriented toward helping and rehabilitating juveniles, judges may choose simply to issue verbal warnings. They may also sentence juveniles to probation or child education and training homes and juvenile training schools. These institutions offer correctional education, including both vocational training and courses similar to those offered in the public school systems.

The French may jail children 13 or older but are more likely to issue treatment that helps the juvenile. The French philosophy is not to condemn the child but to provide protection, assistance, supervision, and education. The courts require a background check of the juvenile's medical and psychological records and social environment. Juveniles may be placed on probation or in group homes or foster care. The courts provide medical treatment as needed. Juveniles under 13 may not be fined or confined in a locked institution. Although used infrequently, prison is a possibility for juveniles 13-16, but they will receive only half the maximum adult term. Juveniles over 16 may be sentenced to the full adult term. Nonpenal sanctions may not go beyond the day the juvenile turns 18.

Canada's philosophy seems more like that of the United States. It tends to focus somewhat less on treatment and welfare and more on punishment and rights. The Canadian system uses something as simple as fully discharging the juvenile to two years' probation. Juveniles may also be required to pay restitution and fines up to $1,000 or to serve up to 240 hours of community service. More complex treatments may exist for up to three years and may include psychiatric care. Canada puts the more serious juvenile offenders in government institutions.

Judges

In the United States, almost all juvenile judges are attorneys who come to the court without specialized experience. There are organizations that provide training, but it is usually voluntary. These judgeships are generally regarded as low-status assignments. In many places, judges serve for only a short time and often hear other types of cases. In metropolitan areas, it's more likely that judges will serve for several years. The quality and quantity of probation and other court services vary from state to state.

To qualify for judgeship in Japan, a person must serve as an associate judge and/or practicing attorney for at least 10 years. Judges are appointed by the Japanese supreme court. They serve a 20-year term and preside exclusively over juvenile issues. They receive vast amounts of assistance from highly trained and qualified personnel such as police and probation officers, who rank among the best university graduates and pass a vigorous examination. Judges also have access to and may call on medical doctors and psychologists for help with a case.

French judges must be civil servants having a law degree and at least three years' additional and specific training in law and the social sciences. The French place much faith in judges and prosecutors, giving them abundant discretionary power. Judges take the role of investigator, psychologist, family counselor, and decision maker. They handle 90 percent of cases informally in their offices using helping methods such as mediation and counseling. They also may opt to work closely with social workers in offering support to juveniles. If a case goes to trial, presiding are one juvenile judge and two other "judges" who are respected community residents serving without pay for a four-year term.

Canadian judges closely resemble those in the United States. Each province establishes standards and appoints judges. In the past, these could have been social workers or some other trained professional. Currently, they are almost always attorneys who have not necessarily received specialized training prior to appointment.

In all the countries examined, juvenile justice attempts to balance children's interests with the community's interest in safety, and all take a slightly different approach. Comparing justice systems is one way to identify how to improve the judicial system everywhere. One cannot help but wonder how effective the U.S. system would be if it incorporated the more useful and successful aspects of other countries' systems.

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Shelly Gordy is a graduate assistant in the legal studies program at Sangamon State University in Springfield, Illinois.

Teaching Strategy

Remanding to Adult Court: You Make the Call

Joseph L. Calpin

How will you judge the defendant? Will the 16-year-old in the case below be tried in adult criminal court or stay in the juvenile justice system? Which parts of the law are more important in reaching your conclusion? The focus of this activity is to enable teachers and resource persons to help students examine the remand laws and apply them to this case, which is typical of many that juvenile court must decide every day.

Background

Across the United States, the issue of juvenile crime is a growing concern. The local and national media are filled daily with drive-by shootings, sexual assaults, school shootings and assaults, gang rapes, and many more serious crimes committed by youth under 18. The growth in serious juvenile crime has increased the use of remanding suspects under 18 to criminal court. Each state has a law setting guidelines to determine in which legal system the suspect will be tried. *Oregon Revised Statutes* (O.R.S.) 419.533 is typical of most state laws. A child 15 or older at the time of the commission of the alleged offense may be remanded to adult criminal court if certain conditions are met. The law asks the juvenile court to examine the type of crime; the possible types of treatments offered by the two systems; the youth's physical, emotional, and mental state at the time of the alleged crime; and the youth's prior history (treatment, criminal acts). In following the guidelines, the juvenile court must balance what is best for the youth and what is best for society.

Grade Level

For high school students.

AP/WIDE WORLD PHOTOS

Under what circumstances should adolescents accused of breaking the law be tried as adults?

Time Required

Allow one day. The lesson can be done in greater detail over two to three days by allowing greater time to prepare arguments and having the hearing officers/judges write fuller decisions.

Materials Recommended

- A copy of your state's remand laws for students to review
- Photocopies of the student handouts provided in this lesson

Objectives

1. Students will become acquainted with remand laws.
2. Students will become acquainted with a defendant's case file.
3. Students will apply a sample remand law to the facts of a case.
4. Students will gain insight into the complexity of the remand law's use.
5. Students will use listening, arguing, writing, critical thinking, and decision-making skills.

Procedure

1. Distribute and review Student Handout 1, "Remanding of Child to Another Court of Law."
2. Select 2-4 students to act as attorneys for both sides: one or two for the state (district attorneys) and one or two for the defendant (defense attorneys). Give each side Student Handout 2a or 2b, their attorney briefing sheets.
3. The remaining class members will be juvenile hearing officers (or judges, if appropriate in your state). Their assignment is independently to hear the two sides and, in light of the remand law, to decide whether or not to remand this juvenile.
4. After explaining the role of the hearing officers/judges, pass out Student Handouts 3 and 4, "Case File Number 55-21-4285" and "Hearing Officers/Judges Worksheet." Allow the students a few minutes to read both.
5. The hearing is now scheduled to start. Have the attorneys sit at a desk facing the rest of the class; you will act as court clerk. Call out

the case, and have one student act as the presiding hearing officer/judge. This student will allow the state to go first with its case. Allow any hearing officer/judge to ask questions as both sides present their information.

6. Have all the hearing officers/judges write down their decisions on the worksheet, plus the parts of the law that apply.
7. Start debriefing by having the hearing officers/judges read or restate what their decisions are and what parts of the law apply. At a chalkboard or with an overhead projector, the attorneys will keep track of the information under the headings "Ruling (Yes/No)," "Law," and "Law Number."
8. Based on the outcome, continue to discuss this case and the issue in general.
9. Finish with this information: Around 85 percent of this case is based on a real one. The 16-year-old was remanded to adult criminal court. At trial, the jury was faced with either finding the youth guilty of murder (facing 20 years in prison) or manslaughter (3-5 years). The jury decided on manslaughter, with 3 years in prison (3 fewer years than if the youth had not been remanded).
10. Change some of the case facts. For example, make the driver under the legal age to drive. In another class, change the youth's sex. Use a resource person to write a new case file based on a local case.

Resource Person's Note

Resource persons having only one day (40- to 50-minute period) to complete the activity might want to make the following changes:

1. Distribute and review remand law.
2. Act out the attorney role for both sides. (Two resource persons taking different sides will have the best impact.)
3. The entire class/group will act as hearing officers/judges.

Joseph L. Calpin teaches government at Tigard High School in Tigard, Oregon.

Student Handout 1

Remanding of Child to Another Court of Law

1. The juvenile court may remand a child to an adult criminal court for prosecution as an adult if:
   (a). The child is 15 years of age or older at the commission of the alleged offense;
   (b). The child is alleged to have committed an offense constituting murder or any aggravated form of a Class A or Class B felony or any of the following Class C felonies: escape, assault, arson, robbery;
   (c). The child at the time of the alleged offense was of sufficient sophistication and maturity to appreciate the nature and quality of the conduct involved; and
   (d). The juvenile court, after considering the following criteria, determines by the preponderance of the evidence that retaining jurisdiction will not serve the best interests of the child and of society and therefore is not justified:
      (A). The insufficiency of the treatment and rehabilitation techniques and facilities available to the juvenile court;
      (B). The protection required by the community, given the seriousness of the offense alleged;
      (C). The aggressive, violent, premeditated or willful manner in which the offense was alleged to have been committed;
      (D). The previous history of the child, including:
         (i). Prior treatment efforts and out-of-home placements; and
         (ii). The physical, emotional, and mental health of the child;
      (E). The child's prior record of acts that would be crimes if committed by an adult;
      (F). The gravity of the loss, damage, or injury caused or attempted during the offense;
      (G). The prosecutive merit of the case against the child; and
      (H). The desirability of disposing of all cases in one trial if there were adult co-offenders.
2. The juvenile court shall make a specific, detailed, written finding of fact to support any determination of remanding.
3. A person under 18 years of age shall not be remanded for disposition as an adult under any subsections of this law unless the child is represented by counsel during the remand proceedings and is alleged to have committed an act or acts that, if committed by an adult, would constitute one or more of the following crimes:
   (a). Murder, aggravated murder, or attempt to commit murder or aggravated murder;
   (b). Manslaughter;
   (c). Assault;
   (d). Rape, sodomy, or other sexual crimes;
   (e). Robbery;
   (f). Cases involving violation of law or ordinance relating to the use or operation of a motor vehicle, boating laws, or game laws.
4. After the juvenile court has entered an order remanding a child to an adult criminal court, the child will no longer be able to use the juvenile court system for this charge. If the child is not remanded to adult criminal court, the case against the child will proceed in the juvenile court system.

Student Handout 2a

District Attorney's Briefing Sheet
(For Your Eyes Only)

Your goal is to have Mark Mars remanded on murder and hit-and-run charges. Use any of the following hints, plus your own, in your argument before the hearing officers/judges.

Issues

Hit and run
Murder

Facts

With an automobile, Mark Mars deliberately hit the victim and left the murder scene to avoid being caught.

The victim was on the side of the road, ruling out any possible accident.

The defendant has a history of being fixated on killing and dying.

The crime was an acting-out of a poem he wrote about killing and running over a possum.

The defendant is knowledgeable about the nature of the crime.

The defendant is a danger to society.

Law

The state believes the following parts of the remand law apply to this case:

1st. 1.a. Defendant's age (over 15 years).

2nd. 1.b. Nature of offense (murder).

3rd. 1.A. Insufficiency of juvenile court to handle the case.

4th. 1.B. Seriousness of the offense.

5th. 1.C. Premeditated and willful manner of the offense.

6th. 1.D.ii. Youth's mental health.

7th. 1.F. Gravity of loss (victim's life).

8th. 1.G. Prosecutive merit of the case.

9th. 3.f. Use of a motor vehicle.

Student Handout 2b

Defense Attorney's Briefing Sheet
(For Your Eyes Only)

Your goal is to prevent Mark Mars from being remanded on murder and hit-and-run charges. Use any of the following hints, plus your own, in your argument before the hearing officers/judges.

Issues

A 16-year-old boy with no prior record

An alleged crime that should not lead to remanding when viewed without the charged emotions the state has added

Facts

The defendant is charged with a crime that hasn't any witnesses.

The defendant has no prior criminal record.

The defendant is a good student at a good school, and he has never caused problems there.

The defendant has a legal right to compose poems on whatever subject he chooses. Writing does not mean action will occur.

The defendant might have a mental problem that the adult system cannot help him with.

The defendant is the type of individual best served by the juvenile justice system.

Law

The defense believes the following parts of the remand law apply to this case:

1st. 1.c. Defendant's insufficient sophistication or maturity to understand the nature of the alleged offense.

2nd. 1.A. Available treatment and rehabilitation techniques in the juvenile system.

3rd. 1.B. Lack of need for community protection from defendant.

4th. 1.D.i. and ii. Defendant failure to meet the guidelines established under these provisions regarding previous history.

5th. 1.E. No prior record to support a call to be remanded.

6th. 1.G. Lack of prosecutive merit to the case.

7th. 3.f. Lack of stipulation that motor vehicle's use requires a call for remanding.

8th. The entire law, which the defendant should not be subject to, is aimed at serious and continuous juvenile offenders and does not describe him in any way.

Student Handout 3

Case File Number 55-21-4285

Accident Report

March 25, 1992. Call received about a possible hit-and-run accident in the early evening at 5:46 p.m. Upon arriving at the scene, a body was located in the roadway. No skid marks were found on the dry roadway. The victim was positioned with her head facing in a southerly direction in approximately the right quarter of the road. I observed extensive head injury due to the fact that blood was being expelled from ears, mouth, and nose. The victim had no shoes on her feet. The victim appeared dead. A search of the accident area turned up no witnesses. A license plate was found, and an owner search was started. Only limited physical evidence was found—part of a broken headlight, a piece of molding from a car, and a book bag and shoes belonging to the victim.

Officer's Notes

The license plate search turned up a Mrs. Mary Mars as the registered owner. I, along with a fellow officer, drove to the address of Mrs. Mars. Finding her home, we asked her if she knew where the car was at this time. She said her son used the car most days and guessed he must have it. I informed her that the license plate was found at the scene of a death caused by a hit-and-run accident. I asked where her son might be now. She said she did not know but that he should be home soon. He was most nights. I returned to the police car to use the radio and was hailed by a fellow officer still in the house and told that the son was on the phone and had said he did it. He called from a neighboring community about five miles from our location. We asked that he stay at the phone booth. We called the other police department to meet and detain the suspect until we could arrive. Upon arrival, we found the suspect and the car. The car was damaged on the passenger side, and the front license plate was missing. The suspect showed his driver's license to prove that he was Mark Mars. We read Mark his Miranda rights and took him to the police station. On the ride to the station, Mark said over and over in the back seat what appeared to be, "My emotions, my emotions just got the best of me." At the station, Mark was asked if he wanted an attorney, and he said no. His family was contacted and said they would have an attorney by morning. His stepfather (Mr. Sam Saturn) and mother arrived at the station after I had questioned Mark. I taped the conversation, but the machine did not record. I asked him again if he wanted an attorney. Again, he said no. I asked if he was driving in town between five and six that evening. He answered yes. I asked if he had driven on the street where the accident took place. He said he might have. I asked him how the car was damaged. He answered that he hit something. I asked him what did he hit? He repeated the statement he had made in the police car on the way in. I asked him if he remembered talking to the police officer on the phone at his home and telling him that he had been involved in the accident. He did not answer. At this point, the district attorney's office was contacted, and Mark was taken, without seeing his parents, to juvenile hall for the night.

Next Entry

Four days after the accident, the following information is known:

1. The dead girl was walking home from the school bus on a dark and narrow street.
2. She did not know the suspect.
3. No one witnessed the accident.
4. The auto was damaged. It had a dented and broken grill, and the fiberglass molding on the front passenger side was broken. The license plate found at the scene belonged to this vehicle. All damage was on the passenger side, and the dead body was found on the passenger side.
5. Mark Mars is the only suspect and has not spoken with us since the first night.
6. There are mixed reports about his family life and his school performance. (Read statements by other individuals on background checks.)

Background Checks

Friend #1 The friend said that he had known Mark Mars for two years at the private prep school they both attended. On the evening of the accident, Mark called and came over to the friend's house not too far from the location of the phone call and arrest site. He said Mark was very strange that day. Mark took him outside and showed him the car and said a body had caused the damage. Mark left a short time later.

Friend #2 This friend said she had known Mark for four years, both having gone to the same grammar and high school together. She said Mark's family life was very bad. She did not add to this statement. She said Mark had talked with her two days earlier and wanted to run away from home. He said that, except for her, girls did not understand or like him.

School teacher #1 This teacher had Mark in class each of the last two years. He thought that Mark was a loner at school but a very bright student in class. Mark had been doing better in graded work except for the last week. His grades were *B-* last year and *A-* this year. He had not turned in the last two assignments. Mark had written some great poems in this English class, but the subject matter was always about death or dying. On the day of the accident, he made a deposit for the annual school trip two months hence to see four major plays in New York. The most recent book read in class was entitled *Native Son*, in which a young man kills someone in order to gain notoriety.

School teacher #2 This teacher had known Mark only during this school year. In a social studies class, Mark did well except in group work. On a recent unit about families, Mark complained that he had the world's worst family. He said he hated his stepdad and his mom. He hoped they would get "it" someday. He never defined *it*.

School counselor She said Mark had one of the highest scores on the entrance exam in his whole class. He had never been in trouble at school, but one day at the end of his first year, he was acting so strangely that he was taken to a hospital at the end of school. His mother met him at the hospital, and tests were run. Nothing was found, and, by the next Monday, he seemed fine.

Neighbor #1 This neighbor was about Mark's age. He said that the two were friends, but now each went to a different school and had different interests. He said he had heard Mark talk about violent desires he had. Mark would have something like an anxiety attack and breathe heavily, but quickly calm down and then start giggling. The two used to talk about killing people and watched all the videos they could about killing and death. He said Mark told him he had raped the neighbor girl at gunpoint when he was 14-1/2. He said he did not believe Mark, but Mark would always tell the story. The neighbor said most of what he told me occurred about two years ago.

Neighbor #2 The girl whom Mark told at least one person he had raped said it never happened. She said once the two were alone in Mark's house. He acted weird and she left. After that, she had not seen or talked with him.

Juvenile Criminal Report

Mark Mars has no prior formal adjudications. He has two informal referrals. One was at age 10 for destroying political signs with three other 10- and 12-year-olds. The other occurred when his parents called the police to their house because of his weird behavior, threatening his stepdad and mom. He was found handcuffed in his room, apparently having put the cuffs on himself. He was sent to a hospital, and no further action was taken.

Family Life

Mark Mars lives in a wealthy area. He is an only child. He lives with his natural mother and a stepdad. There are no financial problems for this family. Neither mother nor stepdad was willing to answer questions about their relationship with Mark. Mark attended a private prep school and was passing all classes. He was not involved in school clubs or activities. He had the use of a recent, expensive automobile. No other information is available.

Psychiatric Evaluation

Mark Mars was examined once by a licensed provider. The exam showed a young man who was fixated on death. His discussions all had a way of returning to the subject of death. When asked if he had witnessed a real death, he giggled. During the meeting, he appeared to have an anxiety attack, and the session ended at that point.

Drug Test Results

A blood test showed no presence of drugs or alcohol.

Search Warrant

A search warrant was served to collect writings and other items from Mark's room in the family home. The family was most upset by this, but the search was completed. Five notebooks were collected. Eight poems, six with grades (which appear to be school assignments) were also collected. Most dealt with the subject of death. One ungraded poem was about running over a possum. It was very long and went into great detail about how to do so, what it would feel like, and what the animal's post-condition would be.

Victim's Parent Statement

Our daughter was only 13 years old when she was hit and left to die on a street by this young man. If he had tried to stop and help her after running her over, we might be able to understand that he made an error. If there had been skid marks or any other sign that he did not aim at her, we might be able to understand. We hope and believe that he should be remanded to adult court for his actions. Our daughter was a loving young girl, always helping others and caring for people. It is not fair that he should receive anything less than the maximum penalty.

Mark Mars's Statement

Under advice of counsel, Mark Mars used his Fifth Amendment rights.

Student Handout 4
Hearing Officers/Judges Worksheet

Use this worksheet to keep notes during the hearing. The state, represented by the district attorney, will speak first. The defendant, represented by his attorney, will speak next. You are free to ask any questions as they occur to you. At the end of the hearing, you must indicate your decision below: yes or no to remanding. Then, using the handout "Remanding of Child to Another Court of Law," specify how you reached this decision. You must site the part(s) of the law and explain how it applies.

Notes on the State's Argument

Notes on the Defense's Argument

Ruling: **Yes** **No**

Part/s of the law that applies and how it applies

1.

2.

3.

4.

5.

LRE Resources

America's Civil Rights Movement

Multimedia curriculum kit (38-minute videotape [1992], 104-page text [1989], and detailed teacher's guide); one kit free per school when requested by principal on school stationery. (Teaching Tolerance, 400 Washington Ave., Montgomery, AL 36104). Reviewed by Susan B. LaGrone, the coordinator of the Magnet Law/Consumer Education Program of the St. Louis Public Schools in St. Louis, Missouri.

The video, *A Time for Justice*, encapsulates America's civil rights movement from 1954 through the Voting Rights Act of 1965. Chronological presentation makes the story line easy to follow. The severity and power of the movement are conveyed through black-and-white still and moving pictures and the poignant narratives of many people who were directly involved in the struggle.

The text, *Free at Last: A History of the Civil Rights Movement and Those Who Died in the Struggle*, is formatted as a magazine. It has three main divisions. The first contains five easy-to-read articles: "Early Struggles" (from slavery to the beginning of the modern civil rights movement); "A Movement of the People" (bus boycott and Little Rock school crisis); "Confrontations" (freedom rides); "Fighting for the Ballot"; and "Days of Rage" (urban rioting).

The second division profiles 40 persons who gave their lives for the movement. As expressed in the video, in this section, "Bodies [become] living witnesses to the cause of human dignity."

The final division is a civil rights time line that includes a map indicating the location of movement events. Black-and-white drawings and photographs throughout the text complement its images.

The video and text are powerful materials. The teacher's guide can be of substantial assistance to those using one or both resources with children and young adults. In one-, three-, and seven-day lesson plans, the guide provides strategies, questions, possible answers, and activities that encourage an understanding of the movement.

One concern is with the word *inferior* used in the video introduction. The audience is asked to "Imagine being unable to eat or sleep in most restaurants or hotels; . . . having to sit in back when you boarded a bus . . . ; being forced to attend an inferior school." *Inferior* needs further explanation. Perhaps adding the words *resources*, *equipment*, *texts*, or *buildings* will help. Certainly, neither the teaching nor the teachers were inferior.

America's Civil Rights Movement is an excellent package that becomes even better by explaining *inferior* and making sure the content is taught, not just viewed.

Democracy and Rights: One Citizen's Challenge

(1989). Videotape. Length: 32 minutes; 16-page teacher's guide; $60.00. (Close Up Publishing, 44 Canal Center Plaza, Alexandria, VA 22314-1592, 800/765-3131). Reviewed by Christopher C. Janku, LRE field director for the Missouri Bar in Jefferson City.

A resource for teachers and high school students, this videotape stresses the importance of citizens' actively asserting their rights and demonstrates that young people's personal involvement and commitment can have an impact on society.

The videotape focuses on the integration by nine African-American students of Central High School in Little Rock, Arkansas, in 1957. It portrays their courage while overcoming the segregation barrier to equal education with the support of the federal courts, President Eisenhower, and the U.S. Army. The videotape intertwines dramatic photographs and film footage from 1957 with coverage of the students' return to Central High on the 30th anniversary of the event. The contrast illustrates the beneficial impact the students' actions achieved.

Commentary by Justice Sandra Day O'Connor and University of Virginia law professor A. E. "Dick" Howard emphasizes that, to maintain our constitutional rights, ordinary citizens must be committed to their preservation. Only if they are willing to act with personal courage will the Constitution survive as an important document and not "just a piece of paper."

Because the controversy occurs in a school setting and involves activities familiar to students, the events continue to have particular relevance to today's classroom. The events will be seen as an example of how the courts and Constitution can have a significant impact on individual lives, not just as a discussion of abstract legal doctrine.

A major focus is on Ernest Green. After graduating from Central High School, Green eventually became an assistant secretary of labor in the Carter administration. His personal achievement conveys a positive message for students confronted with difficult obstacles to success in today's society.

Judicious Discipline

by Forrest Gathercoal (1990). Paperback, 215 pages, $14.95. (Caddo Gap Press, 3145 Geary Blvd., Ste. 275, San Francisco, CA 94118, 415/750-9978). Reviewed by Bruce D. Smith, an assistant professor of education at the University of Cincinnati in Cincinnati, Ohio.

Students in America's schools need to do more than read and talk about justice; they need to experience it. The managerial policies and practices that affect life in their schools and classrooms must be based on the ethical principles that are central to our common life in a democratic society. *Judicious Discipline* provides an ethical framework based on the Bill of Rights for finding just solutions to the problem of how to create order in our schools: "By teaching students their citizenship rights, providing them an opportunity to experience individual liberties, and helping them understand the needs and demands of their social responsibilities, we are empowering students to govern and think for themselves" (1).

Fundamental legal/constitutional principles are presented in the first of four parts. Discussed are the legal basis of student rights under the First, Fourth, and Fourteenth Amendments; basic constitutional concepts such as due process, equal protection, and liberty; compelling state interests such as property loss, health and safety concerns, and legitimate educational purposes that limit individual liberty. Developed in part two is a discipline model based on protection of rights and enforcement of responsibilities, as opposed to discipline based merely on punishment threats. Clear guidelines are provided for educators to design rules and consequences that create an orderly and democratic learning environment. The third section's focus is on practical and just solutions to the difficult problems involved in balancing the rights and educational needs of individual students against the compelling interest of the group. Grading practices, punishment, and speech and expression are among the many topics analyzed. Part four examines the ethical dimensions of the teacher-student relationship, including positive ethical practices and disciplinary practices to avoid.

Judicious Discipline succeeds in its effort to synthesize constitutional, educational, and ethical ideas into a coherent philosophy of discipline. Forrest Gathercoal writes clearly and succinctly and makes complex constitutional concepts comprehensible to readers not trained in law. This text is not a cookbook with ready-made solutions. It presents a thoughtful philosophical framework and an approach to thinking about discipline policies that enables educators to design programs tailored to their own situations. I have used this book as one of several texts required for an undergraduate teacher-education course in classroom management.

Reviewing the Verdict: Issues of the Police, Justice, and Change

(1993). Multimedia package (14-minute videotape, 46-page participant edition, and 15-page instructor's guide); $29.95. (Constitutional Rights Foundation, 601 S. Kingsley Dr., Los Angeles, CA 90005, 800/488-4CRF). Reviewed by Linda Spycher, a social studies teacher and department coordinator at Mount Pleasant High School in Mount Pleasant, Michigan.

For the secondary educator in search of materials for teaching about the Rodney King trial, *Reviewing the Verdict* will provide an exceptional array of both information and activities. The materials include a workbook, instructor's guide, and videotape segment of the May 5, 1992, broadcast of NBC's *Today Show* (including a discussion with the attorneys from both sides of the case). The materials are divided into two major sections. Section 1, "Trial and Verdict," covers the basic facts of the case, legal issues (change of venue, jury selection), arguments by the prosecution and the defense, and the verdict. Section 2, "Aftermath," examines the role of the media, the Reginald Denny case, the possible effect of race on the criminal justice process, and ways to improve police-community relations.

Reviewing the Verdict is appropriate for high school classes but can be adapted to all student levels. It can be used for studying contemporary race relations, the criminal justice system, or the role of the media. The materials are strong enough to be incorporated as an independent study unit in a class dealing with controversy, current events, global issues, law, sociology, or government. The strength of the materials lies in their versatility. The workbook includes short readings, questions to generate discussion, and interactive activities for use with small groups. The instructor's guide includes options ranging from a closely directed two-hour workshop to full implementation involving 15-20 hours of both classroom and outside work. These materials are both well written and well researched, with no need for the classroom teacher to spend additional time creating and preparing lesson plans. They provide a welcome option wherever controversial issues are an essential component of a secondary school class.

Teaching About Law and Cultures: Japan, Southeast Asia (Hmong), and Mexico

by Barbara Miller, Lynn Parisi, and others (1992). Collection of strategies in 216-page, 3-ring binder; $21.95 plus shipping. (Social Science Education Consortium Publications, 3300 Mitchell Lane, Suite 240, Boulder, CO 80301-2272, 303/492-8154). Reviewed by Kathy Bell, the director of instruction for international studies and a law teacher at Mundelein High School in Mundelein, Illinois.

Should the courts grant permission to marry to Sheng Vang, a 15-year-old Hmong American betrothed to Pao Moua, a Hmong graduate student in his midtwenties? In this true case (Colorado, 1990), deeply held cultural beliefs and legal traditions conflict with state law. What is law's role when it conflicts with culture?

Each unit in SSEC's *Teaching About Law and Culture* begins with an essay by noted persons who frame the particular issue in its cultural, historical, or social context. Student handouts, activities, and teacher background complete the unit. In the Hmong unit, the essayist contends that, to understand the Hmongs, students must broadly examine three main themes: clan systems, religion, and culture. Students see the video *Becoming American* and learn that the Hmong immigrated to the United States in the 1970s after the Vietnam War to escape retaliation for their role as guerrilla fighters and valuable U.S. allies against Communist forces in Southeast Asia. In subsequent lessons, students explore geography's role in shaping the history and culture of the Hmong people and examine the customs that underlie Hmong society's unwritten laws. The unit's highlight is the mock juvenile hearing in which the students decide whether Colorado should grant permission for Sheng Van to marry Pao Moua.

Reaction to this program has been favorable, as evidenced by one student's comment from high school law class exit evaluations: "I think the cases we tried and simulations we participated in had a great deal to do with how much we learned about law because we were actually more aware of how much law does indeed affect people both positively and negatively. For example, the Hmong case helped me come to a more complete and in-depth conclusion about American laws and foreign customs conflicting." The lessons in the Hmong unit, as well as those in the Japan and Mexico units, are easy to implement. They hold student interest and, most important, allow students to learn that "as the nations of our world continue to become increasingly interdependent, all citizens will need to understand the cultures, social structures, and political frameworks of other nations." Teachers can benefit from using these lessons because they provide real opportunities for students to explore relevant issues related to cultural groups who are evident in our increasingly diverse nation.

We Can Work It Out!

by Judith Zimmer (1993). Manual with reproducibles, 132 pages, $40.00. (Social Studies School Service, 10200 Jefferson Blvd., Dept. L9, P.O. Box 802, Culver City, CA 90232-0802, 800/421-4246). Reviewed by David Keller Trevaskis, the executive director of law, education, and participation (LEAP) at Temple University School of Law in Philadelphia, Pennsylvania.

This wonderful new manual on problem solving through mediation is aimed at middle and high school educators. Zimmer's collection of user-friendly materials (8 lesson plans covering 12 hours of instruction, 21 student activity sheets, and 16 mock mediation scenarios) provides a solid foundation for teaching young people about mediation. *We Can Work It Out!* outlines a model for conducting mock mediations that is based on the popular mock trial format used in schools across the nation to teach the basics of trial process. The model provides for cooperative problem-solving experiences, distinguishing it from the numerous training programs seeking to develop a cadre of trained mediators to staff peer conflict-resolution programs. The manual provides training for all students in conflict resolution as a life skill. Using the manual will certainly complement any established conflict-management effort, but establishing such a program is not a prerequisite for using Zimmer's book.

The manual begins by showing how to prepare for a mock mediation and then moves into its series of educationally sound lessons using a variety of strategies and methods that are supported by student activity sheets. Once the students have completed all the exercises, they can practice their conflict-resolution skills by working through the mock mediation scenarios, which mirror the types of conflicts facing young people today. Four scenarios involve teenagers with other teens, four are school based, three center on young people with their parents, two are job related, two occur in a community setting, and one focuses on a landlord/tenant dispute. The student activity sheets, as well as the mediation scenarios, may be copied for classroom use, allowing a single manual to serve an entire class and making the program a bargain for schools and community centers.

We Can Work It Out! is part of the national Teens, Crime and the Community Program (TCC), a joint effort of the National Institute for Citizen Education in the Law (NICEL) and the National Crime Prevention Council (NCPC).

Simple Justice

(continued from page 9)

We do a lot of different things. We do mock trials and moot courts . . . senate hearings . . . it's real interesting, but the kids don't think we're really doing schoolwork. They always think that they've got a scam going, that they're tricking me into not doing a lesson. Yesterday, as one of the kids left, he said, "Now this is the way school should be—just some friendly, interesting little talks." . . . They're so interested in learning about themselves as independent, autonomous people . . . and what are my rights, and what can I do, and what can't somebody else do. And they are so ripe at that age, and they aren't really . . . entrenched in a certain mind-set, and they're so motivated by it.

This survey was not designed to yield statistically valid results; but I did learn that, although we have difficulty defining justice, it is important to us all. Is there a relationship between culture and justice? Yes. What is that relationship? Answers are as diverse as those who contributed to this discussion and those who are reading about it. We will all have to arrive at our own conclusions. But following are some themes that cut across all cultures.

Students want to know that their teachers are not simply trying to indoctrinate them with patriotic values. They want teachers to be realistic and honest about issues that are important to students and that students learn about outside the classroom. In any situation, I know that it is difficult to expect honesty while respecting confidentiality; but agreeing upon ground rules at the beginning of a semester or a teaching unit not only promotes trust but models a valuable skill. I know that students value freedom, but I learned that they do not define freedom as a lack of structure. They want to know what the rules are, how to set limits, and what will happen if their behavior is inconsistent with those limits—in the classroom, on the street, and at home. And they want to know how to remedy unjust rules.

If there is anything to be learned from this study, it is that there is no simple or concise way to define justice. Students and teachers alike want their cultural identities to be respected. Justice lessons are legitimized when they actively recognize and value the diverse perspectives that contribute to understandings of the concept. Historians, leaders of state, politicians, and poets offer definitions as diverse as those given by these students and their teachers. Perhaps this definition from Learned Hand best describes the concept's elusiveness: "Justice, I think, is the tolerable accommodation of the conflicting interests of society, and I don't believe there is any royal road to attain such accommodations concretely." ☐

Through Teacher's Eyes

(continued from page 20)

they are interested in justice issues. Patricia Dean claimed her middle school students already are aware that appropriate treatment of other human beings is a core concept associated with justice; they know that justice is not merely a matter of whether people are equally treated but that the kind of treatment, and the existence of democratic relations between those with authority and power and those without, are important justice tests. But she also noted that "13-year-olds are very black and white. It's either all one thing or another. . . . For them, a core concept of justice is 'Am I gonna get more? Am I gonna get more than she got, than he got?' It all has to do with 'did you give that person more?' From more attention to more licorice, to a word on their paper. Did you give that person more than you gave me? And they're very happy with more than anybody else, but not at all happy with less. . . . I would like, in some idyllic world . . . for them to be a bit bothered [when] their pile is bigger than the person next to them. But I'm not sure that that's a realistic expectation. Who is bothered by that, really?"

Dean's students are mostly poor and mostly African American. Many are counted among the needier students in the city. Is it asking too much that they develop a sense of social justice that goes beyond concern to even the score for themselves? That seems to me a very productive question for middle school students to explore. Who is bothered when their pile is larger than someone else's? Under what conditions does this occur? Is it always appropriate to be bothered when you have more than someone else? Is it appropriate never to care when you have more and someone else has less? How much less will make you start to care? As Lawrence Kohlberg knew well, and spent his life striving to make accessible to others, a "just community" is a reality only when community members commit themselves to working out the meaning for themselves.

Issues of historical and economic justice are worth considering because they force us to acknowledge the power of ethical considerations as standards that give shape to our ideas of a life worth living. It is because justice issues are problematic that we must raise them with students. Young people should learn that justice is a difficult ideal, difficult to articulate and difficult to implement. Why keep this a secret? Why pretend it is possible for any group of citizens anywhere to know with certainty that their ideas of justice are universally acceptable? Why not ask adolescents to recognize the difficulty of setting a standard for social justice, and to value the attempt to promulgate such standards because they are difficult? ☐

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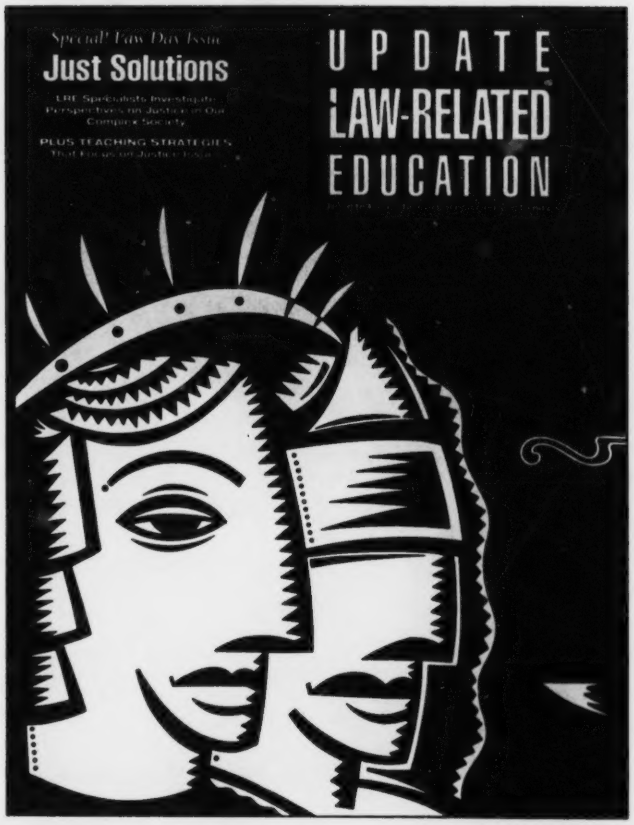
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School Law

Are Schools Violating Students' Civil Rights in Efforts to Deal with Increasing Violence and Sexual Harassment? Are Dress Codes the Answer? Is There Room at School for Religion? LRE Specialists Offer Their Perspectives in This Issue.

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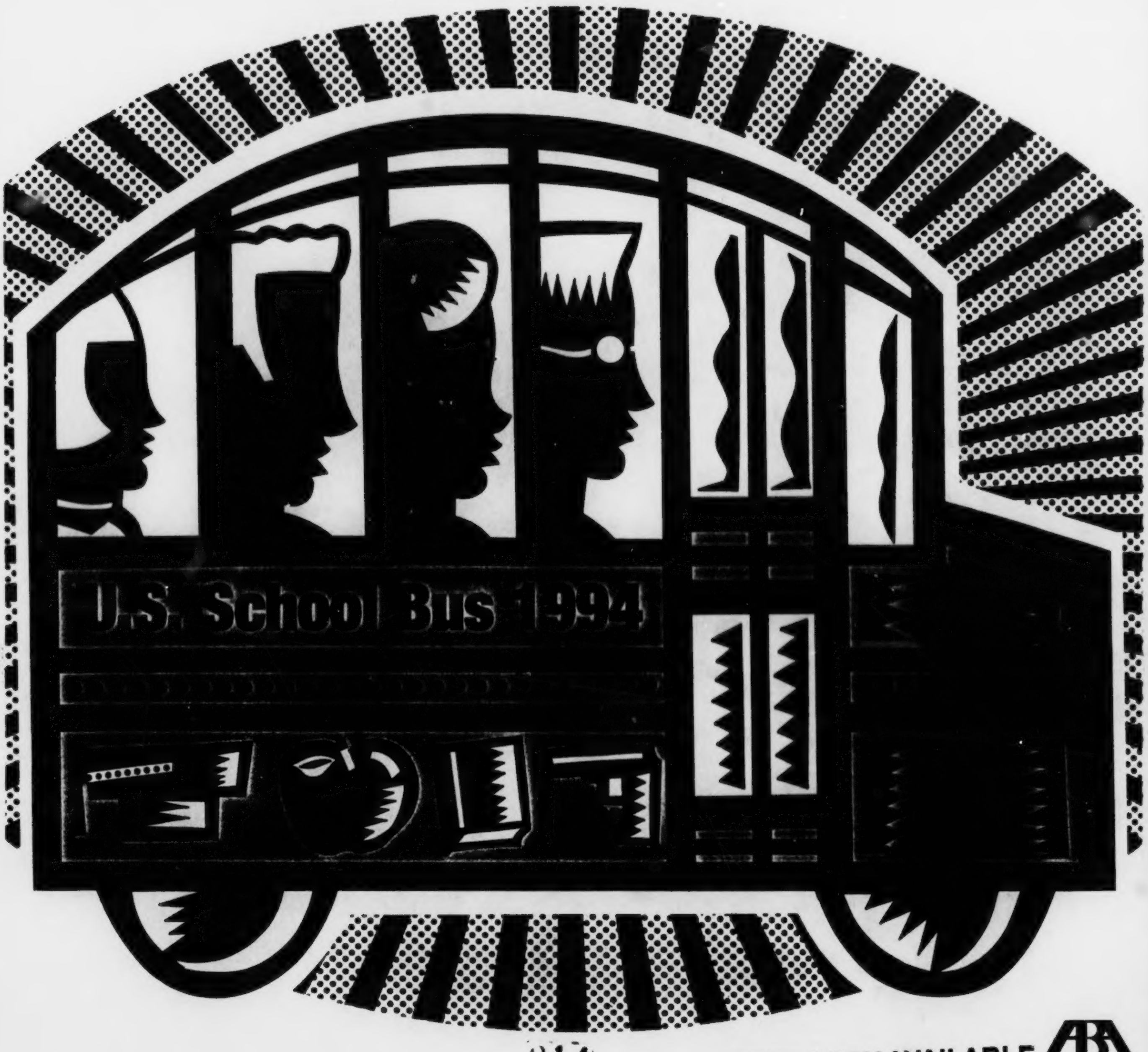

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School Law Issue

For LRE Teachers, Program Developers, and Resource People

What's inside?

> *If somebody had told me in the sixties that we would have the problems we have today with drugs and guns, I would not have believed it.*

So states Margaret Bush Wilson in her pictorial essay on *Brown* in this issue, encapsulating my feelings while putting it together for press. How do your school memories compare? I can recall a dress code that limited girls to one crinoline and boys to dress pants, no jeans. And then there was the drug problem—kids smoking in the bathroom. How about those fist fights teachers broke up by themselves, or detention for giggling in class during opening prayer? And, how embarrassing! Boys sat like crows on the schoolyard fence, waiting for girls to walk past so that they could sneak a whistle when the teachers weren't looking.

Some things will never change, of course. Teenage romance is one of them. But others seem gone forever. Today, students confront an intensity of violence and sexual harassment that were previously unknown to our nation's schools. In a word, the change is astounding. Another generation's hopes of making the nation's schools the best that they can be have not been realized. In fact, some problems have deepened, and others have been added, including perhaps the worst—guns. And one issue that seemed settled forever—the place of religion at school—is now confused as never before.

This issue of *Update on Law-Related Education* paints a disturbing picture of today's school environment. Yet, at the same time, it will help teachers and their students understand why that environment has changed, what the legal ramifications of their problems are, and how they might be able to reaffirm the possibility of attaining, and preserving, harmony and justice in the classroom.

Special thanks go to Julius Menacker—our guest editor—who accepted the task of producing this challenging edition. Characteristic of Julius, he did a splendid job of organizing the discussion and helping the contributors target educators' special needs. We appreciate his hard work and lifelong commitment to bettering our nation's schools.

Seva Johnson —

Seva Johnson
Editorial Director
YEFC Publications

Contributing Writers

Aggie Alvez
Hilda Harris
Melissa Lumberg
Ralph D. Mawdsley
Julius Menacker
Gayle Mertz
Paula Nessel
Carolyn Pereira
Stephen A. Rose
David Schimmel
Theresa A. Thorkildsen
Charlotte Wager
deana harragarra waters
Margaret Bush Wilson

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Update helps classroom teachers and law-related education program developers educate students about the law and legal issues. The views expressed in this document are those of the authors and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association, nor do they represent the official position or policies of the U.S. Department of Justice or the Special Committee on Youth Education for Citizenship.

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**DON'T MISS OUR SPECIAL EQUAL JUSTICE EDITION
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Youth Education for Citizenship
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U.S. School Bus 1994

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Springfield, Illinois

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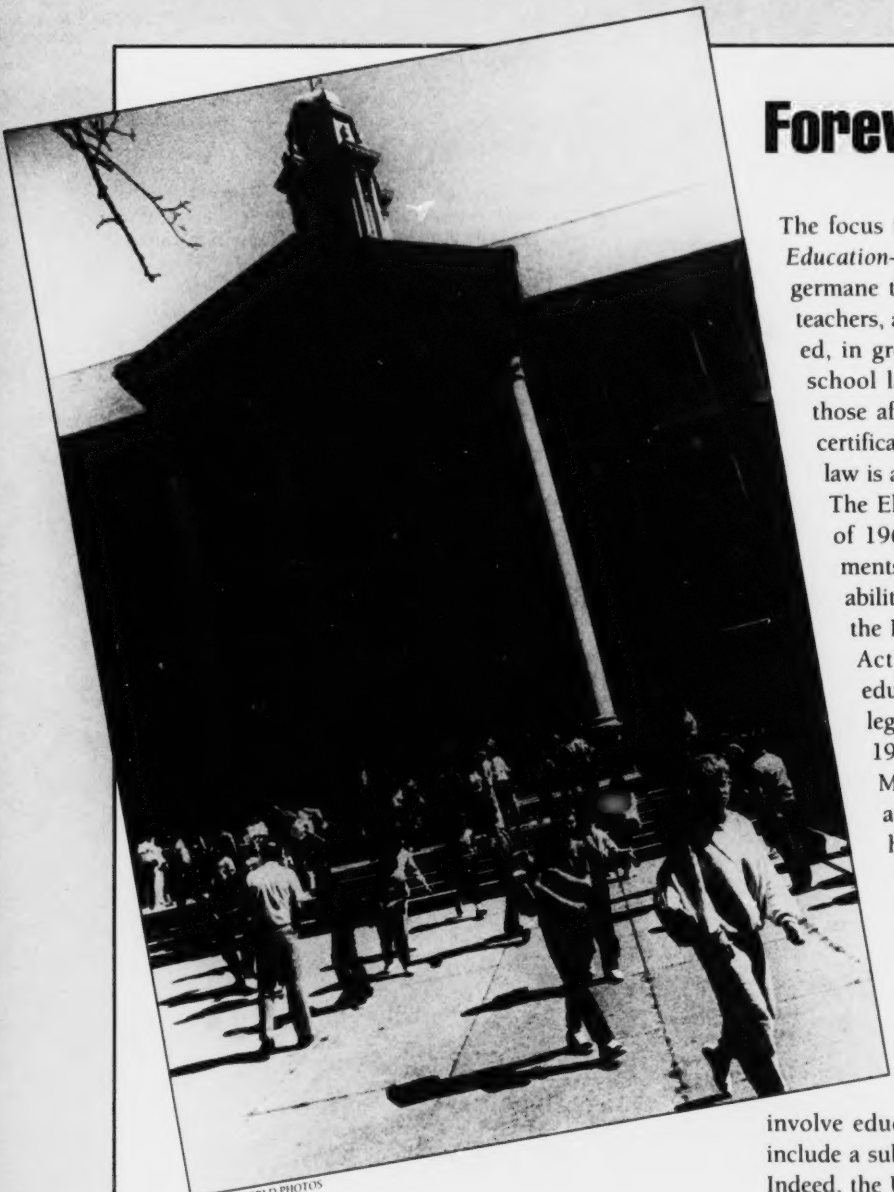
Foreword



AP/WIDEWORLD PHOTOS

The focus for this issue of *Update on Law-Related Education*—school law—is one that is uniquely germane to the readers of this journal. Students, teachers, administrators, and parents are all affected, in greater or lesser degree, by the scope of school law, which includes state laws such as those affecting compulsory attendance; teacher certification; and required areas of study. School law is also found in national legislation such as The Elementary and Secondary Education Act of 1965, Title IX of the Education Amendments of 1972, and the Individuals with Disabilities Education Act of 1990 (superseding the Education for All Handicapped Children Act of 1975). Further legal influence on education is found in national civil rights legislation, such as the Civil Rights Act of 1964 and the Rehabilitation Act of 1973. Most important, several of the civil rights amendments to the U.S. Constitution have been applied to public education. These include First Amendment rights to religious freedom, free speech, and freedom of the press; Fourth Amendment privacy rights; and Fourteenth Amendment rights to due process and equal protection.

Because of the wide range of legislative and constitutional issues that involve education, state and federal court dockets include a substantial number of school-related cases. Indeed, the U.S. Supreme Court decision in *Brown v. Board of Education* (1954), in which the Fourteenth Amendment's Equal Protection Clause was interpreted to bar racial segregation in public education, stands as one of the most significant decisions in Supreme Court history. Other Supreme Court decisions have also stimulated wide interest and deep emotions. These include the decisions in the 1960s in which the Supreme Court barred prayer and Bible reading from public schools, and decisions that strongly enhanced student rights during the 1960s and 1970s. Similarly, recent court erosion of some of these student rights has produced strong feelings on both sides of the issues.

In recent years, the scope of school law has expanded. Concerns such as school-related drug abuse, the rights of disabled students, school order and safety, and sexual harassment in the schools have given rise to new laws and the court decisions that interpret them. Also, many state courts have been forced to grapple with the issue of fiscal equity in school financing. Meanwhile, older school-law issues persist, such as the separation of religion from public education and the means to finally bring to fruition the promise of *Brown v. Board of Education*. The importance of schools was nowhere so powerfully put as in the position taken in the *Brown* decision that "Today, education is perhaps the most important function of state and local governments." Therefore, we can expect statutes and court decisions affecting schooling to continue to be an important area of law.

The articles in this issue address both traditional and relatively new sources of legal concern to schools. Margaret Bush Wilson's description of the circumstances surrounding *Brown* traces the wider societal issues that relate to race and equal opportunity in education, and we see how various national conditions, as well as international events, influenced the *Brown* decision. My review of civil rights in the school setting provides a broad framework for understanding how constitutional rights affect a wide range of educational issues.

David Schimmel's article addresses the church-state education controversy. He explains the issues that persist in this long-standing area of educational civil rights law. He also calls attention to the potential for an important policy shift in the manner in which the Supreme Court views the question of separation of church and state in public education. Ralph D. Mawdsley orients the reader to an emerging area of civil rights litigation that has application to schooling: sexual harassment. He explains how this area of law has gained increased court recognition, and he provides guidelines for how school policy can best avoid, as well as respond to, sexual harassment problems.

Carolyn Pereira deals with the relatively recent emergence of school violence as a critical issue, asking whether we can make our schools safe again. She tells us that the most efficacious approach to this end is to treat the disease rather than the symptoms. Pereira believes that, while increased violence is a societal phenomenon, the schools represent the best agency for contributing to a reversal of that trend.

Theresa A. Thorkildsen provides a different approach in her article, which addresses student conceptions of fairness in school learning and testing practices. This perspective concerns the manner in which fairness and justice can be implemented in the classroom in ways that are consistent with principles of law.

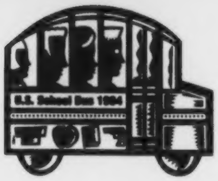
The articles are complemented by recommended teaching strategies and exercises designed to enhance student understanding of, and appreciation for, the role of law in American society and, particularly, in school policy and practice. Accompanying Thorkildsen's article is a survey to detect student attitudes about fairness and justice in classrooms. Stephen A. Rose has developed strategies and exercises designed to capitalize on Professor Schimmel's presentation on legal issues involving religion and the schools. Aggie Alvez has done the same to deepen and broaden student understanding of Professor Mawdsley's discussion of sexual harassment, as well as my discussion of civil rights. Finally, Melissa Lumberg, Hilda Harris, and Charlotte Wager have developed a teaching strategy related to the control of weapons in school that is designed to help students better appreciate the complexities of legal policy-making and their role in solving problems.

All of us who are contributing to this issue do so in the belief that the schools represent the surest and best agency for developing a citizenry that is well-informed and respectful of the law.

We believe that the law applicable to education will be of particular interest to students and can therefore make a significant contribution toward that goal.

Julius Menacker

Julius Menacker
Guest Editor



Civil Rights in the School Setting

An overview of major national school legislation and the federal courts' roles in the constitutional areas of equal protection, freedom of expression, and due process

Julius Menacker

Historical Background

Until the middle of this century, there were relatively few laws affecting educator or student rights and responsibilities, and the number of court cases involving school matters was even lower. Appointment as a teacher was considered a privilege. Therefore, teachers were expected to obey their superiors without question. If teachers wanted to exercise certain civil rights as American citizens, they were free to do so. However, if exercise of these rights offended their employers, they could be discharged.

This "privilege doctrine," as applied to teachers, is illustrated by the U.S. Supreme Court decision of *Adler v. Board of Education*, 342 U.S. 485 (1952), in which a New York teacher was fired for membership in an organization that the state proscribed. In upholding the dismissal, the Supreme Court held that, if teachers "do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere." The Court even went so far as to sanction what would now be considered the undemocratic concept of guilt by association when it wrote that "[o]ne's associates, past or present . . . may properly be considered in determining fitness and loyalty."

The traditional view of student rights was similar but even more restrictive. The dominant position was that it was a privilege to be afforded a free public education and this privilege could be withdrawn when the authorities judged that students were unworthy of this benefit. Educator authority over students was further strengthened by the traditional common law principle of "in loco parentis"; that is, educators have the legal standing of a parent in relation to their students. This principle is well illustrated by the dissent of Justice Black to the 1969 Supreme Court *Tinker* decision, which overturned the privilege doctrine applied to public school students.

In protest over the decision to grant students free speech rights over school administrators' objections, Black wrote:

> I deny . . . that "students" and "teachers" take with them into the "schoolhouse gate" constitutional rights. . . . The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the Nation has outworn the old-fashioned slogan that "children are to be seen not heard"; but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach. . . . Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case . . . subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.
>
> —*Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969)

Decisions for Students and Teachers

There were a few early Supreme Court decisions that did afford rights to students and teachers. Most notable were two decisions in the 1920s and one in the 1940s. In 1923, the Court decided the case of *Meyer v. Nebraska*, 262 U.S. 390. In the isolationist mood of the country following the end of World War I, Nebraska had passed a law prohibiting instruction in languages other than English, along with

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Julius Menacker is professor and chair of the Policy Studies Area in the College of Education at the University of Illinois at Chicago.

foreign language instruction, prior to high school. Meyer, a parochial elementary school teacher who taught German, sued. He contended that this law violated his Fourteenth Amendment right to due process, as the law unreasonably deprived him of liberty and property interests.

The Supreme Court agreed with Meyer, deciding that a "mere knowledge of the German language cannot reasonably be regarded as harmful." Further, Meyer's "right thus to teach and the rights of parents to engage him so to instruct their children [were thought to be] within the liberty of the [Fourteenth] Amendment."

Two years later, the Supreme Court had more to say about parental rights and parochial schools. As a way to insure that proper attitudes of American loyalty and patriotism were developed, Oregon had passed a law that required all children to be enrolled exclusively in public schools. The Society of Sisters, whose parochial school would be closed by the act, sued, claiming that it violated the society's Fourteenth Amendment liberty and property interests. Again, the Supreme Court agreed with the teachers rather than the state. In doing so, the Court issued a memorable statement defining the rights of parents with regard to their children's education:

> [T]he Act . . . unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . [R]ights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty under which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.
>
> —*Pierce v. Society of Sisters*, 268 U.S. 510 (1925)

In the 1920s, the Supreme Court acted to secure the rights of parents, teachers, and nonpublic schools to make educational decisions free from state government restrictions that were clearly unreasonable. In 1940, with the nation on the brink of World War II, the Supreme Court considered whether West Virginia had the right to force all public school students to participate in the flag salute exercise, even though participation would violate the religious principles of some students. In *Minersville v. Gobitis*, 310 U.S. 586, the Court found for the state and against the protesting Jehovah's Witnesses students. However, two years later, the Court showed it could change its mind when, in a similar case, it ruled that the religious principles of the Jehovah Witnesses students were more important than the requirement to salute the flag:

> That [boards of education] are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of government as mere platitudes.
>
> —*West Virginia v. Barnette*, 319 U.S. 624 (1943)

The *Meyer*, *Pierce*, and *Barnette* decisions were exceptions to the general policy of limiting student and teacher rights. This would change as the civil rights movement emerged and the Cold War created greater interest in the effectiveness of the nation's public schools.

School Law Expansion

The Cold War and the civil rights movement increased national legal influence over education. One reason was that, since many of the court cases involved disputes about rights guaranteed by the Constitution, they were heard in federal courts. Another reason was that recognition of the growing importance of education to the national welfare led to the passage of many federal laws providing funds supporting particular educational programs. First, there was the National Defense Education Act of 1958, which provided federal funds to improve mathematics, science, and foreign language instruction, along with school guidance and counseling services. These areas were seen as important to the nation's defense strength relative to the Soviet threat. The influence of the civil rights movement was evident in passage of the Elementary and Secondary Education Act of 1965, which provided millions of dollars to improve and support the education of poor students. This legislation was based on the belief that the best way to eliminate poverty was through education.

Concern for fair treatment of handicapped students was expressed in the passage of the Education for All Handicapped Children Act of 1975 (recently reauthorized as the Individuals with Disabilities Education Act). This act recognized that students with various physical, mental, or emotional handicaps needed to be better served by the public schools, and it gave parents the right to contest school decisions regarding the identification, placement, and treatment of disabled students.

Concerns about equal treatment and fairness also led to the passage of Title IX of the Education Amendments of 1972, which guaranteed equal rights for females in educational programs, and the Family Rights and Privacy Act of 1974, which protected students' privacy and information rights relative to school records. Along with federal funding came federal regulations and oversight, greatly increasing federal influence over public education.

All this legislation, combined with a pro-civil rights attitude in the Supreme Court, created a dramatic expansion of school law. Among the major issues that have defined it are constitutionally guaranteed civil rights, and the balance of this review will focus on constitutional issues.

It should be noted that, while the

Fourteenth Amendment protects people against abuses by state government, the other civil rights amendments protect people only from abuses by the national government. However, the Supreme Court has developed a theory of "incorporation" whereby "fundamental liberties" (e.g., religion, expression, privacy) have been interpreted also to apply to the relationship of the state to its people, by virtue of the Fourteenth Amendment.

We now turn to a review of developments in civil rights issues related to education. While there has been much school-related litigation in state courts, this review will emphasize Supreme Court decisions in the areas of equal protection, due process, and free expression. Other important areas of school law (religion, sexual harassment, school order and safety) are discussed elsewhere in this issue.

Segregation and Equal Protection

Near the end of the 1930s, a new school law issue arose that was to dominate the national scene for decades: racial discrimination in public education. Those opposed to public school segregation claimed that states having it were in violation of the Equal Protection Clause of the Fourteenth Amendment, which mandates that they may not deprive people within their jurisdiction of liberty or property without giving them equal treatment with others; i.e., "equal protection of the laws."

The Legal Defense Fund of the National Association for the Advancement of Colored People (NAACP) set in motion a strategy to defeat legal school segregation in the Deep South and many bordering states. The legal justification for this segregation had been established earlier in the 1896 Supreme Court decision of *Plessy v. Ferguson*, 163 U.S. 537, which announced that, where states established "separate but equal" facilities for the races, the Fourteenth Amendment Equal Protection Clause was not violated.

There was one lone dissent: Justice Harlan held that the "Constitution is color-blind, and neither knows nor tolerates classes among citizens." The NAACP was determined to see that minority view become law.

The NAACP initiated a series of higher education cases in which states were sued because they did not provide "separate-but-equal" law or graduate school educations for African Americans. As states with segregation laws were forced to admit black plaintiffs to graduate and law schools, the NAACP lawyers succeeded in weakening legal educational segregation. Then, as the 1950s opened, the NAACP attacked the major public school issue, which culminated in the 1954 Supreme Court decision of *Brown v. Board of Education of Topeka*, 347 U.S. 483. Led by Chief Justice Earl Warren, a unanimous Supreme Court reversed *Plessy v. Ferguson* and declared public school racial segregation to be in violation of the Fourteenth Amendment Equal Protection Clause. Among the memorable statements made in that decision were the following:

> Today, education is perhaps the most important function of local and state governments. . . . It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
>
> . . . To separate them from others . . . solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . .
>
> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.

The *Brown* decision led to a long list of subsequent school desegregation cases in lower federal courts and the Supreme Court that continue to the present day. One result of the precedent established by *Brown* was the decision of a federal court in *Hobson v. Hansen*, 269 F.Supp. (1967), that the way school testing and tracking policies were implemented, which resulted in the assignment of minority and poor children to the lower educational tracks, violated equal protection. Later, in *Larry P. v. Riles*, 495 F.Supp. 926 (1979), aff'd (9th Cir. 1984), a federal court in California held that the tests used for placing minority students in special education were culturally biased, as were the procedures used.

Meanwhile, the Supreme Court used the Equal Protection Clause to decide cases that (1) required faculty integration in *Rogers v. Paul*, 382 U.S. 198 (1965), (2) approved forced busing to promote school integration in *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1 (1971), (3) required schools to provide for the needs of non-English speakers, under the Civil Rights Act of 1964 in *Lau v. Nichols*, 414 U.S. 563 (1974), (4) required the admission of children of illegal aliens to public school in *Plyler v. Doe*, 457 U.S. 202 (1982), and (5) over the objections of state authorities and voters, approved a lower court order to increase state and local taxes so as to fund magnet schools that would voluntarily attract students of all races in *Missouri v. Jenkins*, 110 S.Ct. 1651 (1990).

After the 1960s, integration supporters received some court setbacks as well. One occurred in the Supreme Court decision in *San Antonio v. Rodriguez*, 411 U.S. 1 (1973). Plaintiffs claimed that a state school finance system that relied on local school district property taxes for the major portion of school funding violated the Equal Protection Clause. The reason was that this system resulted in extreme differences in the money spent for the education of students in rich and poor districts. The Supreme Court rejected this argument. However, in recent years, the issue of state responsibility for equal funding of each student's education, regardless of the wealth of each school district, has been addressed in state courts. The result is that, currently, many state supreme courts have required more equalization in school district finance.

On another aspect of equal protection, white students were given some opportunity to compete with minority students for college places previously reserved for minority students in *Regents of the University of California at Davis v. Bakke*, 438 U.S. 265 (1978). Further, the Supreme Court reversed a lower court order for suburban and city districts to combine for the purpose of promoting integration in *Milliken v. Bradley*, 418 U.S. 717 (1974).

In 1991, the Court terminated a long-standing school desegregation order in *Board of Oklahoma City v. Dowell*, 111 S.Ct. 630 (1991), because progress had been made, even though all vestiges of former segregation had not been completely removed. Then, in *Freeman v. Pitts*, 112 S.Ct. 1430 (1992), the Court determined that a school district under a long-standing desegregation order may be released from court supervision in incremental stages, before full compliance with complete desegregation has been achieved.

Free Expression Decisions

The liberal attitudes toward civil rights in education unleashed by *Brown* saw the Court expand teacher and student civil rights. In the 1960s in *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Supreme Court interpreted the First Amendment's Free Speech Clause to grant teachers free expression rights even when their superiors did not agree to the views, provided the school was not disrupted. The next year, in *Tinker v. Des Moines*, 393 U.S. 503 (1969), the Court gave students the right to free expression on important societal issues, even when school officials objected, provided school was not disrupted.

As with the history of school desegregation cases, there has been some countermovement from the decisions of the 1960s and 1970s. In 1986 in *Bethel v. Fraser*, 478 U.S. 675, the Supreme Court cut back on students' expression rights when it decided that a student who had delivered a high school assembly address that contained "graphic and explicit sexual metaphor" had gone too far. The student's suspension and deprivation of other privileges were upheld because of the school's mission of "inculcating habits and manners of civility" among its students. Then, two years later in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), the Court approved the action of school authorities in censoring materials written by students in the school newspaper because it was "school sponsored," giving school officials the right to determine what was proper and improper to appear in it.

Due Process and Education

In addition to the equal protection rights granted to people in relation to the states in which they live, the Fourteenth Amendment also protects people against the possibility that a state government (or its agents, such as school districts) might deprive them of liberty or property without "due process of law." The due process concept has a long history going back to Anglo-Saxon traditions. Its primary interest is for government to treat people fairly when proceeding against their liberty or property interests. Justice Felix Frankfurter

Pepper . . . and Salt

75% OFF WAR TOYS
MARTY LOWE

"We're disarming."

Reprinted by permission Cartoon Features Syndicate described the essential meaning of due process this way:

> Due process . . . [represents] a profound attitude of fairness between . . . the individual and government. . . . [It] is compounded of history, reason, the past course of decision, and stout confidence in the strength of the democratic faith which we possess. Due process is not a mechanical instrument. . . . It is a delicate process of adjustment inescapably involving the exercise of judgment.
>
> —*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951)

In 1972 in *Perry v. Sindermann*, 408 U.S. 593, the Supreme Court turned to the Due Process Clause of the Fourteenth Amendment to protect tenured teachers against unreasonable dismissal by requiring school authorities to give them a hearing where they could defend themselves by forcing school authorities to justify the dismissal on reasonable grounds. It is instructive to observe that, on the same day that the Supreme Court announced its *Perry v. Sindermann* decision, it also delivered its opinion in *Regents v. Roth*, 408 U.S. 564, where it held that, while teachers had a right to be employed in their chosen profession, in order to establish a liberty or property interest in continued employment, they "must have more than an abstract need or desire for it." Roth, an untenured teacher, could not establish "a legitimate claim of entitlement to it." Therefore, unlike *Sindermann*, Roth's due process claim was rejected. These companion cases illustrate how the Supreme Court attempts to make fair decisions based on the particular facts of each case, while also teaching the public about its reasoning.

In *Cleveland v. LaFleur*, 414 U.S. 632 (1974), the Supreme Court used the concept of "substantive due process" (protection against unreasonable state actions depriving people of property or liberty) to invalidate a school district requirement that pregnant teachers had to leave their jobs when they entered the fifth month of pregnancy, because the school board could not present a convincing justification of why the teacher should be deprived of the opportunity to continue teaching on that basis. Substantive due process was also used by a lower federal court in *Hall v. Tawney*, 621 F.Supp. 607 (1980), to support a student's suit against a teacher who inflicted unreasonable corporal punishment. The court decided that the punishment was "literally shocking to the conscience" and therefore violated substantive due process.

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The Due Process Clause was invoked by the Supreme Court on behalf of students when it ordered schools to give students procedural due process rights before they could be suspended from school. In *Goss v. Lopez*, 419 U.S. 565 (1975), the Court held that "At the very minimum . . . students facing suspension . . . must be given some kind of notice and afforded some kind of hearing." When students were faced with long suspensions or expulsions, they were entitled to greater due process protections, including the right to call witnesses in their defense and to have an attorney.

Scope of School Law

Our nation has always viewed the schooling of our youth as important. As a result, even though plenary power over education is within state authority, the national government has also vigorously participated in educational policy matters. This review has been limited to major national legislation and the role of the federal courts in the constitutional areas of equal protection, freedom of expression, and due process. The scope of school law is much broader. It involves issues of religious freedom; privacy; the rights of disabled students and non-English speakers; the rights of female students to equal treatment and freedom from sexual harassment; issues of school order and safety; policy affecting private schools; matters of contracts and property; collective bargaining; questions of school district and teacher liability for negligence and other torts; issues related to teacher evaluation, hiring, and dismissal; home-schooling; and many other topics.

The many state and federal laws and court decisions affecting education are proof of the concern that our nation places on proper, fair, equitable, and effective education. It has fallen to the courts to serve as arbiters of what is and is not legal educational policy, particularly with regard to constitutional civil rights. However, it is important to note that the courts are in a reactive position in our system of governmental separation of powers. Courts can only decide the cases brought before them.

The initiative for school policy lies with local school district boards of education, state legislatures and school boards, and Congress. Therefore, the ultimate authority rests with the people who elect legislators and boards of education, or, in the case of appointed boards, the officials who appoint them. □

Teaching Strategy

Will Dress Codes Save the Schools?

Aggie Alvez

Background

Ripped jeans. Michael Jordan T-shirts. Simpson T-shirts. Doc Martens. Baggy pants. Leather coats. Gold jewelry. Miller beer T-shirts. Red bandannas. Paisley scarves.

Look into any teenager's closet and you're likely to find these and other clothes that are trendy among the high school set. You're also likely to find them on the banned lists of many school districts across the country.

As administrators try to grapple with the increasing violence in their schools, they are resorting to a variety of methods of keeping the peace. Closed lunches, extra security guards, and metal detectors are some of the more drastic measures. But dress codes seem to be the major trend in cities, and they are on the upswing in many suburban areas.

Administrators cite a number of reasons for dress codes. Some baggy clothes and coats are banned because they can be used to conceal weapons or drugs. Expensive clothes and jewelry are banned because students who wear them run the risk of being killed by those who want them. In Washington, D.C., school officials banned shirts emblazoned with handguns and bullet holes because of the alarming rate of homicide among young African-American males. In Grapevine, Texas, Doc Martens-like combat boots were banned because they are associated with skinhead groups. In northern Virginia, T-shirts that insult students from other schools are banned because of their inappropriateness. And, in many school districts, you'll find a boilerplate ban on any T-shirts that promote drugs, alcohol, sex, and violence.

Aggie Alvez is a compliance officer with the Montgomery County, Maryland, Public Schools and a former program director with the National Institute for Citizen Education in the Law.

School administrators say that dress codes help to promote self-respect and reduce conflict. Some schools have gone a step farther in requiring or strongly encouraging students to wear uniforms. In Baltimore City, 90 percent of the elementary school students now voluntarily wear school uniforms, and the policy is making its way to the middle schools.

As gang membership grows throughout the country, so does the number of schools that impose dress codes. Many California school districts ban red or blue bandannas and caps, L.A. Raiders jackets, and other athletic attire because of their association with street gangs.

But, while creating safe and effective learning environments is a necessary school district goal, trying to achieve this end through the imposition of dress codes poses constitutional and practical problems, especially in stemming gang violence.

Constitutional Rights?

Since the 1969 *Tinker* decision (see Student Handout 1), courts have viewed student dress as a First Amendment right not to be abridged unless the expression "materially and substantially interferes with the educational process." To date, there is no empirical evidence that dress codes inhibit school gang activity; yet, some schools ban certain "gang clothing" despite the fact that there are no gangs in the school or community and no showing that the attire interferes with learning in any way whatsoever.

Dress codes are also being attacked because they are overbroad. One Arizona honor student was sent home for wearing a Chicago Bulls T-shirt that his mother had bought him. In the ensuing case, the American Civil Liberties Union argued that the dress code sweeps in protected clothing because professional sports logos are widely worn in the community and are not limited to gangs.

There are some Fourteenth Amendment attacks on dress codes, as well. Minority students, especially African Americans and Latinos, say that schools are singling them out over the clothes they wear. In San Diego, African-American students say they are prohibited from wearing red or blue attire, while their white counterparts may wear the same colors.

Practical problems abound. How do schools determine what qualifies as gang related? How can administrators keep up with the changes in what's "in" from gang to gang and from school to school? Does certain attire signify gang membership or merely MTV viewership? How are angered parents to be appeased when they must buy new clothes for their kids?

Connection to Success?

Can a dress code withstand constitutional scrutiny? Maybe, if a school can show a direct connection between the dress code and academic attainment. While *Tinker* recognized a student's right to free expression, cases since 1969 have retreated from this standard, and the Supreme Court has given broader deference to school boards in determining how best to maintain discipline.

Meanwhile, today, as in the past, students argue that what they learn about the Bill of Rights in their civics or law classes is at odds with what they experience in school. In the sixties, girls couldn't wear pants; in the seventies, heavy metal T-shirts were banned; in the eighties, it was halter tops; and, in the nineties, it's baggy jeans.

Objectives

Can students and administrators find a healthy balance between the First Amendment and the mandate to provide a safe environment conducive to learning? This strategy will engage students in a meaningful discussion about school discipline and school violence through an analysis of the legal, economic, social, and political implications of dress codes. As a result, students will be able to:

- state the rationale for school dress codes
- discuss constitutional, economic, social, and political implications of dress codes
- analyze a dress code from the perspective of community members
- participate in a mock school board hearing

Target Group: Secondary students

Time Needed: 3-5 class periods

Materials Needed

2 signs (see 1 under "Procedures")
Student handouts 1 and 2

Procedures

1. Prepare two signs that say "NO DRESS CODES" and "UNIFORMS FOR ALL." Display them at either end of a wall, forming a continuum. Select 8-10 students to position themselves along the continuum based on how they feel about dress codes. Those who think that all public school students should wear whatever they please should stand under "NO DRESS CODES." Those who think that all students should wear uniforms should stand under that sign. The other students should arrange themselves somewhere in between.

(continued on page 12)

Student Handout 1: *Tinker, Fraser, Hazelwood,* and *T.L.O.*

A. *Tinker v. Des Moines School District*, 393 U.S. 503 (1969)/6-1-2

Facts

As symbols of their objection to the Vietnam War, Mary Beth Tinker, her brother John, and several other students decided to wear black arm bands to school. When school administrators learned of this, they adopted a policy of asking anyone wearing arm bands to remove them. Students who refused would be suspended until they returned to school without the arm bands. The Tinker group knew this regulation and wore their arm bands anyway. No violence or serious disruptions occurred, although some students argued the Vietnam issue in the halls. The Tinker group were suspended from school when they refused to remove their arm bands.

Issue

Is wearing arm bands at school to protest a war a form of speech that the First Amendment protects?

Court Decision (Fortas)

Yes, wearing arm bands is a form of expression (symbolic speech) that the First Amendment protects. Declaring that "students do not shed their constitutional rights . . . at the schoolhouse gate," the Court reasoned that, while educators may teach what they deem appropriate, "state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students [who] may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." However, the Court said that schools may censor student speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."

Dissent (Black, Harlan)

School authorities should have the power to determine disciplinary regulations for the schools. One may not give speeches or engage in demonstrations wherever he pleases and whenever he pleases. School discipline is an integral part of training children to be good citizens. School officials should be given the widest authority in maintaining discipline and good order.

B. *Bethel School District v. Fraser*, 478 U.S. 675 (1986)/5-2-2

Facts

Matthew Fraser gave a one-minute nominating speech before 600 fellow high school students at a school-sponsored assembly. Part of his speech referred to his candidate in sexual metaphor:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt . . . but, most of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end, even the climax, for each and every one of you . . .

Prior to giving the speech, several teachers advised Fraser that it was inappropriate and he should not deliver it. During the speech, some students hooted and yelled, some mimicked sexual activities, and others appeared embarrassed. Fraser was suspended for violating the school's "disruptive conduct" rule, which prohibits conduct that substantially interferes with the educational process, including the use of any obscene, profane language or gestures.

Issue

Does the First Amendment prevent a school from disciplining a high school student for giving a lewd speech at a school assembly?

Court Decision (Berger)

No, schools must have the authority to "inculcate the habits and manners of civility essential to a democratic society." Public school students' constitutional rights are not automatically coextensive with the rights of adults in other settings. The speech was plainly offensive and acutely insulting to teenage girl students. A school is entitled to "disassociate itself" from the speech to demonstrate that such vulgarity is "wholly inconsistent with the values of public education." Unlike *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint.

Dissent (Marshall, Stevens)

The speech did not disrupt the educational process. Fraser was in a better position to determine whether his speech would offend his contemporaries than a group of judges who are "at least two generations and 3,000 miles away from the scene of the crime." Fraser should not be disciplined for speaking frankly at an assembly if he had no reason to anticipate punitive consequences.

C. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)/5-3

Facts

A high school principal deleted two pages from the year's final issue of the school newspaper because they contained a story on student pregnancy and another on divorce's impact on students. The newspaper had been written and edited by the school's Journalism II class. The principal believed that the first story violated the privacy rights of some pregnant students, even though aliases had been used. He also believed that the references to sexual activity and birth control were inappropriate for some of the younger students. The principal objected to the divorce article because he believed it lacked "fairness and balance" and stressed that the parents should have been given an opportunity to respond to the remarks or to consent to their publication.

Issue

Did the principal's censorship of a school-sponsored newspaper violate the students' First Amendment protection of freedom of expression?

Court Decision (White)

No, the school newspaper is not a public forum for public expression. As a school-sponsored activity that is part of the curriculum, the newspaper may be regulated broadly by school officials. The principal did have the authority to regulate the style and content of the newspaper as long as his actions were "reasonably related to legitimate pedagogical concerns." Here, the principal acted reasonably in trying to protect the privacy of the students and the parents, and in shielding younger students from "inappropriate" material.

Dissent (Blackmun, Brennan, Marshall)

Students should enjoy the protections of the First Amendment whether or not the activity is sponsored by the school. There is no evidence that the stories would have seriously disrupted the classroom or interfered with the rights of others. The only lesson the students learned from the Journalism II class was that important principles of government are mere platitudes.

D. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)/5-1-3

Facts

A teacher in a New Jersey high school discovered two girls smoking in the lavatory, in violation of a school rule. They were taken to the vice principal's office and questioned. When T.L.O. denied that she had been smoking, the vice principal demanded to see her purse. He found a pack of cigarettes and also noticed rolling papers, which are commonly associated with marijuana. The vice principal then searched her purse and found marijuana, a pipe, plastic bags, a large amount of money, and written materials that implicated T.L.O. in drug dealing. The police were notified, T.L.O. confessed, and she was charged with delinquency.

Issue

Are student searches conducted by school officials without probable cause in violation of the Fourth Amendment?

Court Decision (White)

No, while students do have a reasonable expectation of privacy, schools are special environments and this, coupled with the special characteristics of teacher-student relationships, "make[s] it unnecessary to afford students the same constitutional protections granted adults and juveniles in non-school settings." Rather than "probable cause," a "reasonable grounds" standard is acceptable in the school context. When weighing the child's interest in privacy against the interest of school officials in maintaining discipline in the classroom and on school grounds, the latter is more compelling.

Dissent (Brennan, Marshall, Stevens)

The new "reasonableness" standard will only spawn increased litigation and greater uncertainty among teachers and administrators. Schools are places where we "inculcate the values essential to the meaningful exercise of rights and responsibilities. . . . " Using arbitrary methods to convict students is unfair and sends a "curious" message to the country's youth.

Note: Majority, concurring, and dissenting votes appear after case name; author of majority opinion appears after "Court Decision"; all dissenting Justices appear after "Dissent."

When Gangs Are the Problem . . .

Schools shouldn't adopt dress codes to address gang problems unless there is a true gang problem, not a potential one. If there is a gang problem, administration should be prepared to prove that the gang's presence poses a "material and substantial interference" with the educational process. Once a dress code is in place that meets appropriate standards, schools must be careful not to selectively enforce it, and they must keep abreast of changing trends. Some school districts do so by meeting regularly with the local police and updating their students, faculty, and parents on the changes.

For example, those who believe that there should be certain restrictions depending on grade level, would be toward the center, while those who would impose yet other restrictions would move closer to "UNIFORMS FOR ALL." Tell the students they will have to talk to one another in order to determine exactly how they should line up.

Once the students are in place, ask them to describe their positions, but not to give any reasons for selecting them. Students who feel they are standing in the wrong place may move at any time. Next, ask the students to justify their positions, making sure there are no interruptions by those "on the line" or by those remaining in their seats. Give all students the opportunity to question those on the line. Ask students to cite the most compelling arguments they heard from either end.

2. Review the First Amendment with the students. Distribute Student Handout 1, "*Tinker*, *Fraser*, *Hazelwood*, and *T.L.O.*" If they have already studied these cases, use the handout for review. If not, analyze each case thoroughly.

   You may want to use a cooperative learning strategy, such as the jigsaw method, to have students teach each other the facts, issues, and decisions of the cases. Emphasize the following points for each case:

   Tinker: The school must prove that there is a "material and substantial interference with the educational process" in order to limit speech. It must show actual, not just potential, disruption.

   Fraser: This case is a retreat from *Tinker*, where the Court gave broad deference to school boards. This case would probably support dress codes.

   Hazelwood: Another retreat from *Tinker*. The Court said that, while schools had to tolerate speech, they need not promote it. Again, broad deference is given to schools.

   T.L.O.: Although not a First Amendment case, *T.L.O.* shows a retreat from student rights and defers to the schools on how best to maintain discipline.
3. Review the concepts "overbreadth" and "vagueness" when analyzing laws or policies. A statute is overbroad, and therefore unconstitutional, when it sweeps in protected speech along with speech that may legitimately be curtailed. A statute is vague, and therefore unconstitutional, when "reasonable people would guess at the law's meaning and differ as to its application."
4. Divide the class into groups of 3-5. Distribute Student Handout 2, "Tri-Valley Dress Code." Read "Proposed Dress Code" and "Is There a Dress Code Violation?" Tell each group to decide whether each of the scenarios involved a dress code violation. There should be some controversy in trying to apply the proposed dress code to each situation. Tell the students they will be able to participate in a mock school board hearing to discuss the policy.
5. Read "Mock School Board Hearing." Assign each group one of the eight roles, and split off a ninth group to act as the school board (select an odd number of students to ensure a majority vote.) Each group should prepare its argument/statement for the hearing. The "school board" should elect a president and develop questions to ask each group.
6. Conduct the mock hearing. After all testimony is heard, the school board should confer openly for the class to hear, and then vote.
7. The school board may vote to accept the policy with certain modifications. The groups can then be assigned to draft a new policy following these criteria: the policy should be constitutional, clear, understandable, and enforceable.
8. Compare the policies drafted by the students with your school's dress code or those of other schools.

Are Curfews an Answer to Crime?

Ask your students to try to answer this question after reading them this list of cities that use curfews to curb rising juvenile crime rates. Explain that, since enforcement varies from city to city, it's hard to tell whether curfews really do curb crime. Civil liberties groups protest curfews as unfairly restricting teenagers' liberty without allowing due process.

- Atlanta, Ga.
- Buffalo, N.Y.
- Dade County, Fla. (Miami)
- Dallas, Tex.
- Hartford, Conn.
- Milwaukee, Wis.
- Newark, N.J.
- Phoenix, Ariz.
- Tampa, Fla.

Student Handout 2: Tri-Valley Dress Code

Proposed Dress Code

Teachers and administrators of the Tri-Valley School District are concerned about the increase of violence in their schools and note that there is a growing problem with weapons and drugs, as well as pockets of gang activity. District parents and educators in the district believe that, when students wear T-shirts that symbolize drugs, violence, and sex, they make the schools a "breeding ground for immoral, illegal, and dangerous behavior."

In response to the concerns of teachers, administrators, and parents, and in an effort to develop a consistent policy for the entire school district, the following dress code for students in grades K-12 is proposed:

> *Dress Code*
>
> The students of the Tri-Valley School District have the inalienable right to attend schools that are safe, secure, and peaceful. They have the right to exercise free expression except where that expression creates a clear and present danger of unlawful activity, of the violation of school regulations, or of the substantial disruption of the orderly operation of the school.
>
> Students are prohibited from wearing any clothing or accessory that:
>
> 1) promotes or glorifies violence, drugs, tobacco, or alcohol or;
> 2) contains gang symbols or logos, or denotes gang affiliation or;
> 3) is sexually obscene or explicit or;
> 4) promotes unlawful or immoral behavior.
>
> Students who violate the dress code will be asked to remove the offensive clothing and may face disciplinary action if they refuse to do so or if the incident is repeated.

Is There a Dress Code Violation?

1. Middle and high school students have begun wearing T-shirts depicting a 9 mm handgun on the front with the words "If This Don't Get Ya," and a picture of an Uzi on the back of the shirt with the words "This One Will."
2. A sixth-grade girl wore a T-shirt that bore the words "Real women love Jesus."
3. A fifth grader wore a Chicago Bulls T-shirt. Gang experts have stated that clothes with professional teams on them have been linked to gangs and could make those wearing them easy targets for gang violence.
4. High school students have begun wearing "safe sex" shirts with anti-AIDS messages and clear pockets with condoms in them. Some of the slogans on the shirts include: "Tools for Late Night," "Deep Cover for the Brother," and "AIDS—HELL NO."
5. An eleventh-grade male student wore a T-shirt depicting a woman shoved in a trash can with her underwear around her ankles. The caption read: "Guns 'N Roses was here."
6. A twelfth-grade female student wore a T-shirt with the caption: "I'm a lesbian and I vote." A controversial election over a gay rights ordinance was to be held in a few weeks.
7. A junior high school student wore a shirt that said: "Save the planet. Kill a cop."
8. An eighth grader came to school wearing baggy khaki pants several sizes too big for him. Gang experts say the oversized pants signify gang affiliation. Students who belong to gangs attend the school.

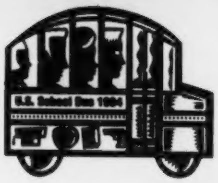
Mock School Board Hearing

The proposed dress code of the Tri-Valley School District will be the topic of an open forum before the next school board meeting. Representatives from these groups will testify before the board:

Support Dress Code	*Oppose Dress Code*
PTA	Coalition of Vendors, Retailers, and Manufacturers
Fraternal Order of Police	American Civil Liberties Union
Fellowship of Christian Student-Athletes	Students for School Rights
Teachers Union	Parents Against Censorship

Guidelines

1. Testimony will be limited to four minutes per group.
2. School board members will have the opportunity to question speakers.
3. The school board will confer in open session and vote on the proposed dress code at the conclusion of all testimony.



From Consensus to Confusion:

Should the Wall of Separation Be Demolished or Rebuilt?

An analysis of the development and disintegration of Supreme Court Establishment Clause interpretations, and the ensuing public controversy over separation of church and state

David Schimmel

In 1947, the nine Supreme Court Justices all agreed that the Establishment Clause of the First Amendment was intended to build a wall of separation between church and state. Today, that consensus has been shattered, not only among the Justices, but also throughout the country. On the Court, there are two or three competing interpretations of the Establishment Clause, and it is unclear which interpretation would receive a majority vote in any given case. In hundreds of communities throughout the country, there is mounting confusion and controversy among lawyers, educators, and voters over a recent Supreme Court decision that outlawed invocations and benedictions at public school graduations.

This article traces the extraordinary progression of Establishment Clause interpretation from consensus to confusion. After outlining the Court's original interpretation of the Establishment Clause, it examines how that interpretation was developed by Justice Burger in *Lemon v. Kurtzman* and later attacked, first by Justice Rehnquist and then by Justice Scalia. Finally, it focuses on the Court's conflicting opinions in the graduation prayer case, *Lee v. Weisman*, and the intense public controversy that continues to surround this complex and contentious issue.

David Schimmel is a lawyer and professor of education at the University of Massachusetts at Amherst.

Precedents

Everson: *Erecting the Wall*

Our story of constitutional interpretation begins in 1947, when the Supreme Court was required "to determine squarely for the first time" what was an establishment of religion. In *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1, 29 (1947), all the Justices agreed with Thomas Jefferson that "the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'" However, the Justices split 5-4 over whether the Constitution should prohibit the government from reimbursing parents for transporting their children to religious as well as public schools. The majority held that the First Amendment did not prohibit reimbursement; the dissenters argued that it did. While the Justices differed about the height of the wall, they did not differ in their adherence to the principle that church and state should be separate.

Not surprisingly, the dissenters argued that the purpose of the First Amendment was broader than prohibiting an established church: "it was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." In fact, wrote Justice Rutledge, "we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion."

While the majority did not feel that a law helping parents transport their children to religious schools violated the Establishment Clause, they were as zealous as the minority in their strong and uncompromising support for the principle of separation. Thus, on behalf of the Court, Justice Black concluded with these categorical statements: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."

In sum, both the majority and the dissenters seemed unequivocal in their belief that the Establishment Clause called for a strict separation of church and state. Over the decades, that consensus would erode. That erosion began to appear in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), a landmark case in Establishment Clause interpretation decided 25 years after *Everson*.

Lemon: *The Three-Part Test*

In *Lemon*, Chief Justice Burger summarized "the cumulative criteria developed by the Court over many years" in interpreting the Establishment Clause. This summary, known as the three-part test for determining whether a challenged government policy or practice was constitutional, stated: "First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."

Lemon concerned Rhode Island and Pennsylvania laws that provided salary supplements and salary reimbursements paid to teachers in nonpublic schools. Applying the three-part test to the facts of the case, the Court found that the laws involved unconstitutional entanglements between government and religion. However, in striking contrast to the Justices in *Everson*, Chief Justice Burger repeatedly confessed that the purpose of the Establishment Clause was far from clear. Thus, he wrote that its meaning "is at best opaque" and that "Candor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." Again, in contrast to the clarity of *Everson*'s "high and impregnable" wall of separation, Burger wrote: " . . . the line of separation, far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." Thus, in *Lemon*, Justice Burger begins to undermine the Court's previously clear "separationist" approach to Establishment Clause interpretation.

Despite the Justices' apparent discomfort with *Lemon*, the Court continued to apply the three-part test in most Establishment Clause disputes and, as in *Grand Rapids v. Ball*, 473 U.S. 373 (1985), "in every case involving the sensitive relationship between government and religion in the education of our children." However, the Justices continued to be sharply divided in their application of the *Lemon* criteria in the cases that came before them during the 1970s and 1980s. During those decades, the Court considered over 27 cases dealing with establishment of religion; the Justices wrote almost 100 opinions, and in only three of those cases was the Court unanimous in its judgment (Underwood 809).

Rehnquist: Attacking Lemon *and the Wall*

After *Lemon*, several other Justices joined Burger in expressing doubts or concerns about the three-part test, but there was little strong, direct attack until 1985. Then, in a long dissent in *Wallace v. Jaffree*, 472 U.S. 38, 109 (1985), Justice Rehnquist not only attacked and repudiated the *Lemon* test, but he also tried to demolish its philosophical foundation, the wall of separation. (The following discussion of Justice Rehnquist's views is taken from Schimmel [1992]).

In *Jaffree*, the Supreme Court used the *Lemon* test to hold an Alabama silent prayer law unconstitutional because it had no secular purpose and was intended to advance religion. In his detailed 22-page opinion, Justice Rehnquist first noted that *Lemon*'s secular purpose part has been difficult to apply because the Court has never fully defined it or clearly stated how the test is to operate. Furthermore, wrote Rehnquist, *Lemon*'s entanglement part creates an "insoluble paradox" in school aid cases: courts "have required aid to parochial schools to be closely watched lest it be put to sectarian use; yet this close supervision itself will create an entanglement."

An additional problem with the three-part test, according to Rehnquist, is that it has "caused this court to fracture into unworkable plurality opinions depending upon how each of the three factors applies to a certain state action." Thus, the *Lemon* test has led to confusing and contradictory rulings that have "produced only consistent unpredictability." Justice Rehnquist concluded that, if a constitutional theory such as the three-part test has no basis in history, "is difficult to apply, and yields unprincipled results, I see little use in it."

A familiar judicial response to the difficulties or inconsistencies in applying a constitutional standard such as the *Lemon* test is to modify or reformulate it. This approach is illustrated by Justice O'Connor's suggestion that the *Lemon* test be "refined" to focus on the question of governmental endorsement of religion. Instead, Justice Rehnquist chose a radical approach—a complete rejection of the underlying principles that

Rehnquist: Establishment Clause History

When Justice Rehnquist wrote his long dissent to *Wallace v. Jaffree*, he presented a dozen pages filled with historical quotations to support his argument about the original meaning of the Establishment Clause. First, he discounted Jefferson's interpretation (since he was in France at the time the First Amendment was passed and ratified). Then he included quotations from James Madison, George Washington, members of the First Congress, and leading 19th century scholars to indicate that the clause simply "forbade establishment of a national religion and forbade preference among religious sects." He emphasized, however, that "it did not require government neutrality between religion and irreligion, nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion."

Thus, Rehnquist concluded: "There is simply no historical foundation for the proposition that the Framers intended to build a wall of separation" between government and religion. In fact, wrote Rehnquist, "the wall of separation 'between church and state' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should," he urged, "be frankly and explicitly abandoned."

support the three-part test. Thus, he proposed overturning more than 40 years of Supreme Court precedent and the well-established belief that the separation of church and state is and should be a basic constitutional value.

Justice Rehnquist acknowledged that the Court has repeatedly embraced Jefferson's belief that the Establishment Clause was intended to erect a wall of separation between church and state. However, Rehnquist wrote:

> It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years.

According to Rehnquist, the repetition of this misinterpretation by the Supreme Court in a series of opinions since 1947 "can give it no more authority than it possesses as a matter of fact; *stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history."

Scalia: *Satirizing the Conflict*

When Justice Rehnquist wrote his dissenting opinion in *Jaffree*, it received relatively little publicity or comment. In 1985, it was possible to dismiss his views as the lonely, vociferous voice of an Associate Justice at the far right edge of the Court. But this was before Rehnquist was appointed Chief Justice and before the appointments of Justices Kennedy, Scalia, and Thomas, who now support Rehnquist's criticism of past Establishment Clause decisions.

In fact, in recent years, Scalia has replaced Rehnquist as the most strident and relentless critic of the *Lemon* test. Thus, in *Lamb's Chapel* v. *Center Moriches Union Free School District*, 113 S.Ct. 2141 (1993), Scalia satirized a majority of the Justices for even mentioning the *Lemon* test. He began with this creative comment:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . .

Continuing his monster metaphor, Scalia noted that "Over the years, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart." Scalia also emphasized his agreement with the "long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced." He then announced that, henceforth, he "will decline to apply *Lemon*," whether he agrees or disagrees with the results of its use.

O'Connor and Kennedy: *Endorsement and Coercion Tests*

In the aftermath of the Rehnquist/Scalia criticisms, two alternative approaches to Establishment Clause interpretation have emerged to compete for judicial acceptance. The first is Justice O'Connor's "refinement" of *Lemon*, known as the "endorsement" test. Government action endorsing religion is invalid, she wrote, because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community" (*Lynch* v. *Donnelly*, 465 U.S. 668, 687-689 [1984]). O'Connor dropped *Lemon*'s excessive entanglement part and rephrased its purpose and effect tests. Thus, O'Connor's approach asks two questions: first, "whether government's purpose is to endorse religion" and, second, "whether the statute actually conveys a message of endorsement." The goal of her approach, wrote O'Connor, is "to frame a principle for constitutional adjudication that is not only grounded in the history and language of the First Amendment, but one that is also capable of consistent application."

In explaining her test, Justice O'Connor noted that it "does not preclude government from acknowledging religion"; however, it does prohibit government from endorsing religion. The problem with such an endorsement is that, "when the power, prestige, and financial support of government [are] placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain" (*Engel* v. *Vitale*, 370 U.S. 421, 431 [1962]).

A second approach is Justice Kennedy's "coercion" test. Its purpose is to clarify the border between accommodation (which he believes is constitutional) and establishment (which he agrees is not). Under his test, there are two things the government may not do: (1) "it may not coerce anyone to support or participate in any religion or its exercise; (2) it may not . . . give direct benefits to religion in such a degree that it 'establishes a religion . . . or tends to do so'" (*County of Allegheny* v. *American Civil Liberties Union*, 492 U.S. 573, 660 [1989]). These principles are related, since it would be difficult "to establish a religion without some measure of more or less subtle coercion" in the form of substantial economic help to sustain a faith or "governmental exhortation to religiosity that amounts in fact to proselytizing."

Echoing the ideas of Rehnquist, Kennedy wrote: "government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage." Furthermore, any test for interpreting the Establishment Clause that "would invalidate long-standing traditions cannot be a proper reading of that Clause." In contrast to *Everson*, Kennedy wrote that, if the federal courts were installed "as zealous guardians of an absolute wall of separation," this would not reflect government neutrality, but government disapproval of religion.

Weisman: *Mixed Judicial Approaches*

Thus, at the beginning of the 1990s, the Court was badly splintered over the meaning of the Establishment Clause. Several "accommodationist" Justices supported Justice Kennedy's coercion test, which seemed to hold that government accommodation or support of religion was not unconstitutional unless there was coercion or proselytizing. However, other "separationist" judges continued to support the *Lemon* or endorsement test. Then, on November 6, 1991, the extraordinarily controversial case of *Lee v. Weisman*, 112 S.Ct. 2649, 2682 (1992), was argued before the Court.

Weisman involved an invocation and benediction at a Providence, Rhode Island, public school graduation where attendance was voluntary and the prayers by a rabbi were nondenominational and "so characteristically American, they could have come from the pen of George Washington or Abraham Lincoln." This case gave the Court an opportunity to reject *Lemon* and the wall of separation and substitute the coercion test that appeared to allow government to support religion. This seemed not only possible but probable, since three of the Justices deciding *Weisman* had supported Kennedy's coercion test and the Court's newest Justice, Clarence Thomas, was a conservative who also appeared to support the accommodationist view.

Establishment Clause Case Comes Before Supreme Court

On March 31, the Supreme Court heard arguments on the constitutionality of a public school district established in 1989 to serve the needs of 220 special education students from the Satmar Hasidic village of Kiryas Joel (KEER-yas JO-el), about 40 miles northwest of Manhattan. To a greater extent than usual, most of the Justices seemed uncertain of the final outcome. The Court is expected to rule on the case before recessing in July.

When the nearby public school district discontinued providing special education teachers to the village's parochial school in 1985, the village refused to allow its disabled children to enter nearby public schools, where they had been previously ridiculed and harassed while attending. In 1989, the New York legislature carved out the special one-building school district from the existing district.

Last July, the New York Court of Appeals ruled that the special school district amounted to a symbolic union of church and state and ordered it dissolved. During the one-hour hearing before the Supreme Court in March, Nathan Lewin, the school district's attorney, argued that the school district is "wholly secular," serving only the disabled students' special needs. New York State Assistant Attorney General Julie S. Mereson called it a "neutral" answer to the needs of these children, who otherwise are entitled to public school services.

The concerns of Justices O'Connor, Kennedy, and Souter that the district may be in violation of the Constitution's Establishment Clause did not seem eased. But Justice Scalia questioned whether religion is really part of the case—whether the state is accommodating the students' cultural, not religious, differences, such as their use of Yiddish, their distinctive dress, and their "isolation from modernity." Jay Worona, counsel for the New York State School Boards Association, argued that the Satmar's culture and religious precepts can't be distinguished, and that the school district is "a political constituency defined by religious lines."

Kiryas Joel was established in 1977 in Monroe, N.Y. The village has its own government, and its 12,000 inhabitants speak and write mostly Yiddish, wear traditional garb and side locks, have no English-language publications, and watch no television. All the children who are not disabled attend classes at the village parochial school, where boys and girls are taught in separate facilities.

But, on June 24, 1992, the Court announced one of its most surprising decisions of the year, voting 5-4 that the graduation prayers violated the Establishment Clause. Even more surprising was that Justice Kennedy, who had previously favored allowing traditional, noncoercive government support for religion, not only voted with the majority but also wrote the opinion of the Court. The case also produced three other opinions, by Justices Scalia, Blackmun, and Souter, that reflect the different approaches to Establishment Clause interpretation that vie for judicial support. The four *Weisman* opinions are summarized and analyzed for separate review on pages 18-20 as reflecting the full range of judicial approaches to the Establishment Clause that have led to the continuing controversy throughout the country.

Weisman's Aftermath

Compliance

What emerges from the diverse opinions in *Weisman* is a 4-4-1 split. Four of the Justices—Blackmun, Souter, O'Connor, and Stevens—are separationists who support the neutrality approach incorporated in the endorsement test. Four other Justices—Scalia, Rehnquist, Thomas, and White—are accommodationists who support the coercion test. And Kennedy is in the middle. He uses the same test as the Scalia group but arrives at the opposite outcome.

The *Weisman* decision has provoked a variety of responses ranging from willing compliance to patriotic defiance. In many communities, school officials were pleased with the decision because they hoped the Supreme Court ruling would finally put an end to this emotional controversy and enable them to focus on basic education. In other communi-

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Weisman: Opinion Summaries and Analysis

The four judicial approaches to *Lee v. Weisman* summarized below reflect the range of Establishment Clause interpretations that have led to continuing confusion and controversy throughout the country. The summaries and analysis that follow are taken from Schimmel (1992).

Opinions

Kennedy: *Opinion of the Court*

On behalf of the majority, Justice Kennedy holds that it is unconstitutional for public school officials to be involved in graduation prayers where students are pressured to participate. According to Kennedy, the coercion test prohibits subtle and indirect social and psychological pressure as well as direct coercion.

Kennedy points out several troubling aspects of government involvement in the Providence prayers. First, the principal decided that an invocation and benediction should be given. Kennedy explains that, from a constitutional perspective, the principal's decision "is as if a state statute decreed that the prayers must occur." Second, the principal chose the person to give the prayers, and "the potential for divisiveness" over such a choice is apparent. Third, the principal gave the rabbi nonsectarian guidelines for his prayers; thus, the principal unconstitutionally controlled the content of the prayers, which "is no part of the business of government." Admittedly, the principal tried to make the prayers acceptable to most people. The problem is that no government official should produce any kind of prayer for the graduation.

The Establishment Clause against state involvement in religion is based on the lessons of history. One timeless lesson, writes Kennedy, "as urgent in the modern world as in the 18th Century," is that "if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect" the diversity of religious belief. This is especially true in the public schools where "prayer exercises . . . carry a particular risk of indirect coercion."

Concerning the argument that students are not coerced to attend graduation, Kennedy concludes:

> Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. . . . Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions.

Scalia: *A Scathing Critique*

In his dissenting opinion, Justice Scalia attacks Justice Kennedy's interpretation, reasoning, and conclusions. Prohibiting invocations and benedictions, he writes, "lays waste to a tradition that is as old as public school graduation ceremonies themselves" and is part of a "long-standing American tradition of nonsectarian prayer to God at public celebrations." Scalia is equally harsh in his criticism of the Court's judicial approach. "As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion." In a disparaging comment about Kennedy's apparent switch of judicial positions, Scalia notes that the majority opinion shows why the Constitution "cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people."

Scalia then provides a history lesson for his colleagues ("Since the Court is so oblivious to our history"), detailing the many ways prayer has been a prominent part of public events including presidential inaugural addresses (from Washington to Bush), the opening of Congressional sessions and the Supreme Court, and, of course, public school graduations. He mocks Kennedy's theory that graduation prayers involve psychological coercion as "psychology practiced by amateurs," and Scalia comments that, in using such a theory, "the Court has gone beyond the realm where judges know what they are doing." Avoiding the politeness and subtlety that often characterizes judicial differences, Scalia dismisses the majority's reasoning as "ludicrous" and "beyond the absurd."

In an unusual and disturbing paragraph, Scalia observes that this case "is only a jurisprudential disaster and not a practical one." He then explains how public schools can subvert the Court's opinion and include graduation prayers by making it clear "that anyone who abstains from screaming in protest does not necessarily participate in the prayers." Following this sarcastic statement, he advises potential evaders to announce that "none is compelled to join" the invocation or benediction "nor will be assumed, by rising, to have done so."

Finally, Scalia concludes with a popular statement about the significance of public prayer: "To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported by law."

Blackmun & Souter: *A Judicial Counteroffensive*

The concurring opinions of Justices Blackmun and Souter are clear and strong reaffirmations of decades of judicial precedent prohibiting government aid to religion. As Rehnquist and Scalia have won increasing recognition of their criticism of the *Lemon* test and the wall of separation, so Blackmun and Souter have led the effort to rejuvenate and strengthen the principle of government neutrality and separation. They do not concede that Rehnquist and Scalia have the better argument based on history. Instead, Blackmun and Souter argue that history, tradition, *and* precedent are on their side.

Thus, Blackmun's concurring opinion emphasizes "one clear understanding" that has emerged from almost 50 years of Supreme Court interpretation of the Establishment Clause: "Government may neither promote nor affiliate itself with any religious doctrine or organization." Applying the *Lemon* test to the facts of this case, Blackmun concludes: "There can be no doubt that the invocation of God's blessing delivered at Nathan Bishop Middle School is a religious activity" planned, supervised, and endorsed by school officials that promotes religion in violation of prior Establishment Clause decisions.

Unlike Kennedy, Blackmun argues that the Establishment Clause requires more than an absence of government coercion. "It is not enough that the government refrain from compelling religious practices," he writes, "it must not engage in them either." Especially in the public schools, the Establishment Clause prohibits "attempting to convey a message" that religion is favored.

Blackmun emphasizes that separation of church and state protects religion as well as government. Attempts to aid religion, even through subtle government pressure, jeopardize freedom of conscience and diminish "the right of individuals to choose voluntarily what to believe." He concludes that "religion flourishes in greater purity without than with the aid of government."

In Justice Souter's long, scholarly concurring opinion, he first asks: can the government favor nondenominational religion? His answer is no. "Forty-five years ago," explains Souter, "this Court announced a basic principle of constitutional law from which it has not strayed: 'that the Establishment Clause forbids aid to all religions.'" Reaffirming that principle, *Weisman* "forbids state-sponsored prayers in public school settings no matter how nondenominational the prayers may be."

Next, Souter examines Rehnquist's argument that the original Framers of the Establishment Clause did not prohibit the government from providing nondiscriminatory aid to religion. After a detailed analysis of the history and development of the Clause, Souter notes that the evidence is mixed, that neither the Framers nor our presidents shared a common understanding of the Establishment Clause. Assessing the conflicting evidence, Souter concludes, "history neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some."

Finally, Souter distinguishes graduation prayers to a captive audience from official acknowledgments of religion in public life (such as presidential proclamations or "In God We Trust" on coins), which are "rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular." Souter concludes: "when public school officials . . . convey an endorsement of religion to their students, they strike near the core of the Establishment Clause. However 'ceremonial' their message may be, they are flatly unconstitutional."

Analysis

Interpretation Principles

Weisman illustrates three general approaches to Establishment Clause interpretation. Although differing in emphasis, the concurring opinions of Blackmun and Souter reflect the "separationist" approach that has largely dominated the Court for 40 years. Both Justices support the principle of neutrality that prohibits state support of religion. This is fundamentally different from the approach of the "accommodationists" that is reflected in Scalia's use of the "coercion" test, which does not require neutrality and allows noncoercive government accommodation, encouragement, and support for religion if it is nondenominational.

Kennedy suggests a middle ground. Although he also uses the coercion test, he does so in a very broad fashion that prohibits much of the government support for religion that Scalia would allow. This is because Kennedy prohibits indirect and subtle psychological coercion that forbids the state "involvement" in graduation

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prayers that Scalia's approach permits.

Direction

Until *Weisman*, the Court's change of direction seemed clear. It began in 1985 with Rehnquist's dissenting opinion in *Wallace v. Jaffree*, which included a detailed critique of the *Lemon* test and a call to abandon Jefferson's wall of separation. Then, in 1989, Kennedy articulated his coercion test and was joined in his opinion by White, Scalia, and Rehnquist. When Thomas was appointed to the Court, it appeared that the accommodationist block had a majority of the votes needed to overturn the separationist approach. And it seemed as though *Weisman* was the ideal case to use, since there appeared to be little judicial or popular support for rejecting the rabbi's "all-American" nondenominational graduation prayers. But, in *Weisman*, the unexpected happened; Kennedy sided with the separationists.

As a result, the momentum of the accommodationists was halted, and the direction of the Court in Establishment Clause interpretation is no longer clear. Will Kennedy continue to interpret the coercion test so broadly that he will become consistently aligned with the separationists? Will he become the "swing" vote and develop a flexible, middle position that will vary according to the specific facts of the case? Will he return to the accommodationist camp in out-of-school Establishment Clause cases? Or will the retirement of Justice White (who voted with the accommodationists) and the appointment of Justice Ginsburg (who appears to be a separationist) shift the Court back to a solid separationist majority no matter how Kennedy votes? Only future Court opinions will answer these questions.

History and Tradition

In *Weisman*, Scalia claims that tradition is on his side, that history demonstrates that government-supported nondenominational public prayers have always been a part of our tradition and that the Court's opinion is "conspicuously bereft of any reference to history." However, the other opinions also support their views with historical claims and references. Thus, Blackmun's opinion cites "the history of the [Establishment] Clause," the debates of the Framers of the Clause, and Court decisions that have interpreted that Clause since 1890. And Souter's opinion includes even more historical documentation than that of Scalia. Souter presents a detailed analysis of Establishment Clause cases dealing with state-sponsored prayers, shows that "no adequate historical case" departs from his interpretation, analyzes "the history of the Clause's textual development" since the debates in the First Congress, and explains why "history" does not "warrant reconsideration of settled principle."

While Scalia relies on the historical record of prayers in government ceremonies and proclamations, Souter and Blackmun rely more on the history of Court interpretation of the Establishment Clause and the judicial tradition of following precedent. While there is evidence on both sides, Scalia is wrong in suggesting that only his position is supported by history.

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ties, administrators and board members complied reluctantly. Although they felt that graduation prayers were a positive tradition, they agreed to end such prayers because of legal advice, a threat of suit, or their belief that they should comply with the Court's ruling even if they felt it was wrong.

Defiance

In contrast, there are some school boards that have decided to directly defy the decision because prayer was something the board believed in, because defiance seemed popular (even patriotic), and because no one in their community publicly complained. In the central Michigan community of Mt. Pleasant, this popularity was reflected in a newspaper editorial that applauded the school board's "gutsy stand to defy the Supreme Court" and then concluded:

> While we don't encourage disrespect or disobedience for the law, it's encouraging to witness some old-fashioned belief of "standing up for what we believe in."
>
> We'll bet there are a lot of people here, and everywhere, who want to hold on to some pioneering traditions that carried this nation through many generations. . . traditions that have been cycled out of life by court rulings. *(Editorial, Morning Sun, 14 February 1993)*

The editorial felt no need to explain why defying the Court was not encouraging disobedience for the law. Furthermore, by disobeying laws they believe are wrong, school boards and administrators are providing an unintended but dangerous and powerful message to students to do the same.

Evasion and Avoidance

There also are many communities that are looking for legal ways to evade or avoid the *Weisman* ruling and to continue offering graduation prayers without appearing to directly violate the law. This alternative has been encouraged by a number of factors. First was Justice Scalia's dissenting opinion. Thus, when a Wisconsin superintendent's plan to have a local minister deliver an invocation at graduation was challenged, he defended himself legally by printing Scalia's statement on the graduation program's cover: "While all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed by rising to have done so" (Ruenzel 31).

Second was the ruling of a federal appeals court in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992); *cert. denied*, 113 St. Ct. 2958 (1993), which found graduation prayer constitutional because it was initiated and led by students, not school officials. In June 1993, the Supreme Court declined to review *Clear Creek*, which, according to accommodationists, means that some kinds of graduation prayers are permissible. This ruling has allowed some communities to argue that traditional graduation prayers by local ministers are okay if students rather than administrators invite the clergy.

Frustration

Confusion over graduation prayers was intensified by Pat Robertson's conservative American Center for Law and Justice (ACLJ), which sent a bulletin to the nation's 15,000 public schools last spring claiming that prayer at graduation and other public school events is constitutional as long as it is nondenominational and student initiated. This confusion has been compounded by the American Civil Liberties Union's claim that almost any graduation prayer that school officials tacitly approve by putting it in the program is unconstitutional. Therefore, some administrators feel at risk no matter what they do, so they tend to do whatever the majority of their community wishes. With these legal ambiguities and conflicting political pressures, it is not surprising that many school boards are keeping graduation prayer to please their constituents and calling the ACLJ to provide legal protection.

Implications and Observations for Educators

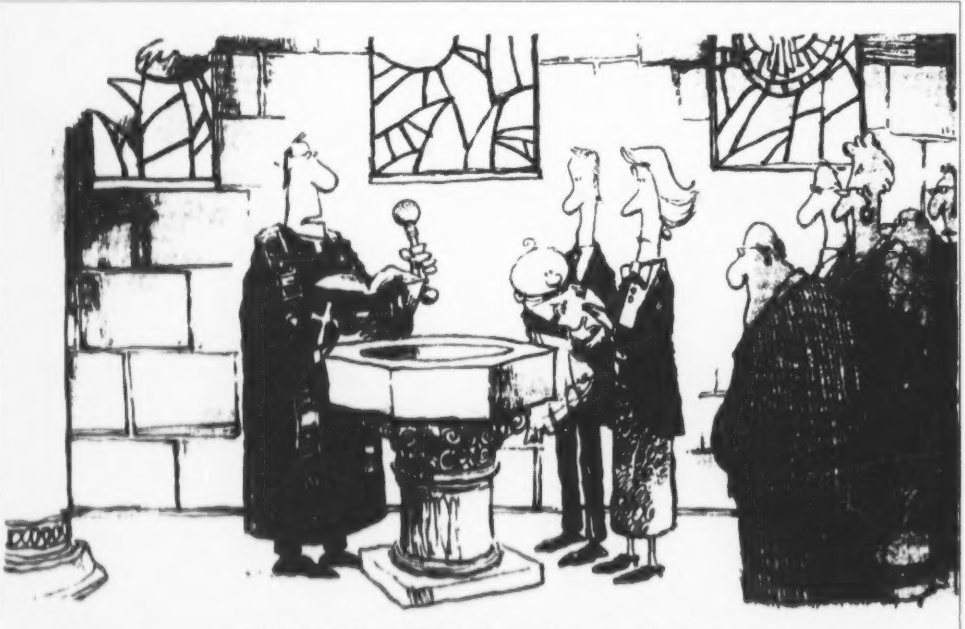
The following observations are based largely on a series of workshops and interviews with teachers and administrators about the Court's interpretation of the Establishment Clause.

Majority Rule

In communities where overwhelming majorities favor school prayer, many voters can't understand why they shouldn't be able to have them. As one midwestern parent asked, "why should a few people on the Supreme Court be able to tell the rest of us what to do?" (Ruenzel 32) These questions challenge educators to do a better job of explaining why the Bill of Rights was designed to place certain fundamental values beyond the reach of the majority, how the tyranny of the majority can be a danger to democracy, and why it is important for the courts to be able to protect the basic rights of dissenting individuals and unpopular minorities.

Degrees of Separation

There is an erroneous tendency to think of those who believe in separation of church and state as sharing one clear, absolutist view. However, recent research indicates that many teachers, administrators, and clergy who say they believe in church/state separation also say they favor graduation prayers. When asked about this apparent inconsistency, they explain that what they mean by separation is prohibiting government funding of churches or religious schools, promoting religion in the public school curriculum, or clergy using the graduation stage to preach sectarian sermons. But this, they say, differs from nonoffensive, nondenominational invocations by different clergy each year. Such prayers they see as part of the American tradition of celebrating public events such as inaugurations and graduations. Although they believe in separation, they explain that they aren't "extremists" or "fanat-



"You hold the child until my lawyer gets here . . ."

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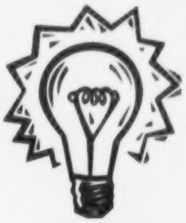

Times Change—Would You?

Here's some information to share with your students to help them understand how governance where there is an established religion can differ from governance where there is separation of church and state. After sharing the information, ask your students to consider how the history of the American colonists and the climate of their times might have influenced the Framers of the Constitution to separate church and state by law.

During colonial times in America, church officials performed many of the roles that government agencies do today. For example, churches operated many schools, and a minister often held classes in his home. Most of the students had to pay fees, however, so that most poor parents could not send their children to school. Instead, they taught their children at home. Besides learning skills that would help support their households, these young colonists had lessons in religious beliefs and obedience.

Generally, all the colonists were deeply religious. In New England, students who were able to attend school often used hornbooks to memorize their lessons. These were boards with a piece of paper glued on and a thin layer of horn overlaid. On the paper were the alphabet, numerals, and the Lord's Prayer.

Many colonists came to America seeking religious freedom, including Puritans, Quakers, Baptists, and Huguenots. Besides supervising education in the colonies, the churches cared for the poor and kept public records such as those for marriage and death. Meetings were held at churches, which were used as community centers for courtship, socializing, and sharing news. Church laws governed colonial activity, and the courts enforced these laws. For example, one law was to observe the Sabbath by not cooking, shaving, cutting hair, or making beds from Saturday afternoon to sundown on Sunday.

For all their religious fervor, colonial groups were often intolerant of other groups and would not allow them the freedom to follow their own beliefs. In most colonies, voting and other rights were restricted to members of a certain church group. In royal colonies like Georgia, for example, citizens were expected to belong to the Anglican Church. Puritans in New England denied citizenship to Quakers and others. Roman Catholics and Jews could not vote in most colonies.

ics" in their beliefs and that it is no more unreasonable to limit the concept of separation than to limit freedom of speech or religion.

Religious Separationists

Just as there are separationists who favor graduation prayers, so there are many who oppose school prayer for religious reasons. Because the plaintiffs in some prominent prayer cases were atheists, there is a tendency to assume that the school prayer conflict is between religious believers on one side and atheists, agnostics, and antireligious humanists on the other. It is important for educators to correct this false portrait and explain why many religious people are separationists.

Historically, Rhode Island's Roger Williams saw separation as a way to protect the churches against state control and "worldly corruption." Today, many share the view that what the government promotes, the government may control and that it is dangerous to allow secular, political authorities in schools or communities to influence and potentially politicize and secularize religion. As Justice Blackmun noted in *Weisman*, "religion flourishes in greater purity without than with the aid of government." Furthermore, some religious sociologists have found that Americans are more religious than citizens of European countries, including those with government-supported churches and religious schools (see, for example, Hatch 210-11). Some conclude that the reason for the greater popularity of religion in America is that, since American churches cannot depend on government support, they are more responsive, relevant, and committed to their members.

This was illustrated by events in a small New England town. When a threat of suit forced the local public school to discontinue its traditional graduation prayers, all of the town's churches joined together to reinvigorate the pregraduation baccalaureate service that had attracted fewer students and parents during recent years. When I interviewed townspeople about the graduation prayer decision, they urged me to come to the baccalaureate service that had become a popular "standing room only" community celebration. Thus, the baccalaureate was transformed from a sparsely attended, little noticed event to one of widespread pride and participation because the government no longer sponsored graduation prayers.

Misinterpreting Separation

Some educators have misinterpreted Supreme Court rulings to mean that public schools should prohibit all religious ideas, books, and symbols. This has led to students being told they could not read their Bible on a school bus and that they could not write religious messages on their valentine cards. Because of this type of misunderstanding, it is important for students, teachers, and administrators to be reminded that the Establishment Clause prohibits only school-sponsored religious activity, not private prayer or the expression of a student's personal religious views.

It is also important to point out

that the Supreme Court has carefully distinguished between public schools' teaching or promoting religion (which is prohibited) and teaching about religion (which is not). Thus, in *Abington v. Schempp*, 374 U.S. 203 (1963), the Court noted that a person's education may not be complete "without a study of comparative religion or the history of religion and its relationship to the advancement of religion." Similarly, the Court wrote that "the study of the Bible or of religion, where presented objectively as part of a secular program of education" would not violate the Establishment Clause.

Judicial Inconsistency

Students and teachers often ask about the inconsistent way the Establishment Clause seems to be interpreted by the courts; for example, allowing invocations at presidential inaugurations but not at high school graduations. While the Supreme Court sometimes has seemed inconsistent in its Establishment Clause decisions, the Court has always maintained a higher wall of separation in cases involving the public schools. This, explained the Court, is because of the central and delicate role of the public schools in American life, because students are compelled to attend, and because they are at a formative and impressionable age.

There is a danger that the constitutional differences discussed here may obscure the broad judicial and popular consensus that distinguishes the United States from the many nations that provide direct support to religious institutions, where a citizen's national identity is tied to religion, and where those who are members of minority religions are considered second-class citizens. Reasonable judges, lawyers, and educators in America differ about how separate church and state should be. Yet, almost everyone agrees that there should be some, but not total, separation. Thus, just as ardent separationists agree that the government should provide fire and police protection for religious institutions, so most accommodationists do not believe that public schools should write sectarian prayers for their students or that students should be penalized for not praying.

Lessons in Constitutional Values

The issues surrounding school prayer provide educators with an excellent opportunity to teach students how to approach controversial issues in a pluralistic society. Rather than avoiding controversy, our public schools can serve as laboratories for teaching tolerance and for modeling how diverse people can discuss their differences in an atmosphere of mutual respect. The goal of such discussions is not to seek superficial or false agreement about serious differences; rather, it is to help students understand views with which they disagree. In the relatively protected classroom environment, teachers can help students learn that people can disagree with them without being disagreeable, stupid, or sinful and that most constitutional controversies are not simply issues of right against wrong, but of legitimate values in conflict. If we fail to teach religious tolerance in the classroom, we will increase the name calling and polarization that occurs when students leave school, cluster with like-minded family and friends, and hurl escalating rhetoric at those with whom they disagree.

Many people are upset about the school prayer cases (and what they see as "the expulsion of God from the public schools") as symbolizing the elimination of traditional values in the curriculum and the substitution of moral relativism. Thus, the challenge for educators is to identify and teach those basic American values about which most opponents and proponents of school prayer can agree. One place to begin is with fundamental constitutional values such as freedom and tolerance embedded in the First Amendment and justice and fairness embedded in the Fourteenth Amendment. It also might be appropriate to consider how these values are rooted and reinforced in both our biblical and constitutional traditions.

Need for Thoughtful Curriculum

As we enter our third century under the protection of the wall of separation, it is unclear whether that structure will continue to withstand the forces that seek to destroy it. These forces include the energy, commitment, and intelligence of those who sincerely believe that its destruction will promote the common good. They also include widespread ignorance, distortion, and misunderstanding about the purposes and effects of the Supreme Court's Establishment Clause decisions. Thus, a more thorough and thoughtful curriculum about the wall of separation is urgently needed. Such a curriculum should explain the reasons why majorities may not override constitutional rights, the importance of tolerance in our pluralistic democracy, and the principles underlying the Supreme Court's Establishment Clause decisions. These lessons can reduce the ignorance, confusion, and misunderstanding that continues to plague our public debate about the delicate relationship between church and state in America.

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aching Strategy

The Establishment Clause: Challenges and Interpretations

Stephen A. Rose

Background

This strategy is designed to translate key concerns and issues of the Establishment Clause debate into a series of learning opportunities for secondary students. The instructional sequence will promote student deliberation and decision making about whether the "wall of separation" needs to be kept high or whether it should be lowered to accommodate certain forms of nondenominational religion at civic occasions.

To learn about the wall of separation, students will (1) study the Supreme Court's interpretations of the Establishment Clause, (2) explore why some Justices want to reconsider the degree of separation between church and state, and (3) make decisions about the constitutionality of clergy delivering prayers at public school graduation ceremonies.

Objectives

Students successfully completing these lessons will be able to:

- specify how the Establishment Clause is designed to protect freedom of religion
- identify and explain how the cases of *Everson v. Board of Education of the Township of Ewing* (1947), *Lemon v. Kurtzman* (1971), and *Wallace v. Jaffree* (1985) contributed to the Court's interpretation of the Establishment Clause
- apply past precedents concerning the Establishment Clause to their reasoning about the 1992 Supreme Court decision in *Lee v. Weisman*
- examine and apply the arguments of Justices Kennedy, Scalia, Blackmun, and Souter in *Lee v. Weisman*
- formulate reasoned views about the Establishment Clause and apply them to *Jones v. Clear Creek Independent School District* (5th Cir. 1992)

Target Group: Secondary students

Time Needed: 2-4 class periods

Materials Needed

- Teacher-prepared transparency: "The First Amendment" (see 1 in "Procedures" below)
- Teacher-prepared handout, "Student-led Graduation Prayer" (see 6 in "Procedures" below)
- Student handouts 1-7

Procedures

1. Introducing the Issues

Prepare a transparency with the text of the First Amendment to the Constitution, or copy it onto the chalkboard when indicated below.

The First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Open the class by asking whether a clergy member should be permitted to say prayers at a public school graduation ceremony. Have students share and discuss their opinions. Then ask whether it is constitutional to have clergy deliver prayers at public school graduation ceremonies.

Present the First Amendment to the class. Underline the religion clauses. Define and explain all relevant terms and phrases. Then have students share their initial views about whether having clergy deliver prayers at public school graduation ceremonies is constitutional. Conclude by having students write their initial opinions.

2. Establishing a Case History

- Distribute Student Handout 1, "Matrix of U.S. Supreme Court Decisions," to the class. Through lecture and discussion, address the issues and precedents organized in the matrix.

  The matrix specifies some of the key features of each case. Be sure to explore the reasons for the unanimous and strong support for the wall of separation in *Everson*. Then explain why it was a landmark case, how the wall of separation applied

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Stephen A. Rose is professor of education at the University of Wisconsin Oshkosh

Note: This strategy assumes that instructors have read David Schimmel's article "From Consensus to Confusion: Should the Wall of Separation Be Demolished or Rebuilt?" in this edition, and that they have a working knowledge of his analysis of constitutional issues and precedents pertaining to this debate. See the article for full citations to cases used here and for further detail about the information in Student Handout 1. In addition to Schimmel's article, other information sources for the student handouts include Schimmel's "Graduation Prayers Flunk Coercion Test: An Analysis of Lee v. Weisman," *which is sourced in his bibliography; and the Supreme Court decision in* Lee v. Weisman (1992). *In constructing the handouts, much of the language the Justices used was modified.*

to the specific issues of the case, and how the precedent set in the case guided the Court for over two decades of Establishment Clause jurisprudence.

- Next, introduce students to *Lemon v. Kurtzman* and the three-part test that was formulated in the majority opinion. Offer hypothetical cases so that students can apply the test. Alternatively, have pairs of students develop hypothetical cases and then apply the *Lemon* test. Be sure to explain how this case marks the beginning of the erosion of consensus among Justices for the strong wall of separation established in *Everson*.
- Explain to students that Justice Rehnquist's bold dissent in *Jaffree* represents an interpretation of the Establishment Clause that is very different from the one originally articulated in *Everson*. Also explain that Justices O'Connor and Kennedy have offered still other interpretations of the Establishment Clause.
- Ask students to reconsider their previous opinions regarding the constitutionality of public school graduation prayers in light of the information you have presented.

3. *Broadening Student Reasoning*

- Distribute Student Handout 2 and have the students read it. Then check their understanding of its facts and arguments. For example, what are *Weisman*'s concerns? What actions did the school take in response to Mr. Weisman's requests? Who decided to have an invocation and benediction? Who selected the clergy? Who gave guidelines for the prayers? What did the prayers say? What did school officials argue? What were the decisions and supporting arguments of the federal, district and appellate Courts?
- Ask students, if they were Supreme Court Justices, what would be their decisions in this case and what reasons would they offer for support? Have students individually write their initial decision, and tell them that they will be sharing their ideas with others.
- Divide the class into "courts" of 4-5 students. Ask each court to develop a decision complete with arguments. A useful method to follow is to have students: (1) identify and analyze the facts of the case, (2) determine the constitutional or legal issues that arise out of the case, (3) develop an argument that incorporates the critical facts, circumstances, and issues, as well as the court precedents, laws, and constitutional interpretations that support their position.
- Have the courts write their decisions using a bulleted outline that incorporates 1, 2, and 3 immediately above. If a court cannot agree unanimously, majority and dissenting opinions with arguments will need to be written.
- When the courts are finished, conduct a class discussion to bring out various viewpoints about the case. Specifically, each court should share its decision(s) and supporting arguments with the class, summarizing them on the chalkboard. Each court should be given time to reevaluate its arguments in light of the information that was presented to the class. Any modifications should be incorporated into the court's written decision.

4. *Acquiring New Information*

This procedure is designed to have students gain new information about the judicial opinions in *Lee v. Weisman*, which are summarized in Student Handouts 3-6 as "Justice A," "Justice B," "Justice C," and "Justice D." At this point in the lesson, it is unnecessary to identify the Justices. However, for the teacher's information, the opinions represented are those of Justices Kennedy (A), Scalia (B), Blackmun (C), and Souter (D).

- Assign students in fours to "expert" groups. As possible, make sure that each group represents a mixture of student ability and gender. Assign each group to one of the "opinion" handouts and give a copy to each group member. Tell the groups that they are to become experts on their Justice's opinion.
- Distribute Student Handout 7, "Expert Questions for the Justices," to each student. This handout contains five questions about each Justice's opinion. At this time, expert groups will answer only the questions related to their assigned Justice. These questions will help each group develop relative expertise on the ideas and arguments of their Justice's opinion. The questions will also help guide students in teaching others later in this lesson.
- Have each expert group consider and discuss all the questions pertaining to their Justice's opinion. Tell students to take notes on what they determine are the answers, as they will use these to teach others their Justice's views. To prepare for teaching, students may wish to practice what they are going to say.
- Once all groups have the appropriate expertise on their assigned Justice, reassign students to new groups so that there is one representative from all the former groups in each new group. Hence, each new group will have four students, each of whom is an expert on a particular Justice's opinion. The task is for the students in each group to teach other members about their Justice's opinion and arguments in *Weisman*. At the end of this activity, each group will be knowledgeable about the Court's main opinions.
- Use Student Handout 7 to conduct a class discussion where students compare and contrast the four opinions.

5. *Revising Student Court Opinions*

- Have students reconvene into their original "courts." Each court possesses a degree of depth about the Supreme Court's interpretations of the Establishment Clause and the resulting arguments made in *Weisman*. This information should be juxtaposed with the student courts' initial decisions and arguments so that a reexamination can be made

(continued on page 28)

Student Handout 1: Matrix of U.S. Supreme Court Decisions

Justice/Case	Establishment Clause Viewpoint	Implications/Other
Black delivered majority opinion *Everson v. Board of Education* (1947)	All nine justices agreed with Thomas Jefferson that "the clause against establishment of religion by law was intended to erect a wall of separation between church and state."	All the justices strongly supported the principle that church and state should be separate. Twenty-four years followed of virtual consensus that the Establishment Clause called for *strict* separation between church and state. The first time the U.S. Supreme Court determined what an establishment of religion was.
Burger delivered majority opinion *Lemon v. Kurtzman* (1971)	Chief Justice Burger repeatedly said the meaning of the Establishment Clause was not clear. It "is opaque" and "we can only dimly perceive the lines of demarcation . . . "	The three-part test was developed to determine whether the Establishment Clause had been violated. For a law or government policy or practice not to do so: (1) It must not have a religious purpose; (2) Its effect on religion must be neutral—i.e., the law must not advance or inhibit religion; (3) It must not foster excessive government entanglement with religion. In this case, the previous consensus began to erode. The three-part test became known as the *Lemon* test.
Rehnquist offered strong dissent *Wallace v. Jaffree* (1985)	Justice Rehnquist raised three important issues with regard to the *Lemon* test: (1) The secular purpose part is difficult to apply because how the test was to operate had never been clearly stated or defined; (2) The entanglement part requires for state financial aid to parochial schools to be closely supervised, which in effect creates government entanglement with religion; (3) The *Lemon* test has led the Court to make confusing and contradictory rulings about the Establishment Clause.	Rehnquist believes that the Court has misinterpreted the meaning of many historical events, all of which pertain to the Framers' concept of the Establishment Clause. He rejects the *Lemon* test in its entirety. If a majority of the Court eventually agrees with him, it would represent a complete rejection of the underlying principles of the test and over 40 years of Court precedent of separation of church and state as a basic constitutional value. The growing Court division was expressed in Rehnquist's strong dissent, which was a full-blown attack on the foundations of the *Lemon* test.
O'Connor *Lynch v. Donnelly (1984); Wallace v. Jaffree* (1985)	Justice O'Connor wants to refine the *Lemon* test with the endorsement test, which would focus on whether government actions endorse religion. She would replace the *Lemon* test's "excessive entanglement" part with what she calls the purpose and effects test, which would ask two questions: (1) Is the purpose of the government statute or practice to endorse religion? (2) Does the statute convey a message of endorsement?	According to O'Connor, the endorsement test does not preclude government acknowledgment of religion, but it does prohibit government endorsement of religion. She maintains that, if the endorsement test is grounded in history and the language of the First Amendment, it could be consistently applied. Government endorsement of religion sends the message to nonbelievers that they are outsiders, not full members of the political community. Endorsement sends the accompanying message to believers that they are insiders. When government endorses a particular religion or denomination, it places indirect coercive pressure on religious minorities to conform to government- endorsed religion.
Kennedy *County of Allegheny v. American Civil Liberties Union (1989)*	Kennedy proposes a coercion test. Its purpose is to clarify the border between what is government accommodation of religion and establishment of religion. Under this test, government may not: (1) coerce anyone to support or participate in any religion or its exercise; (2) give direct benefits to religion in such a degree as to establish religion or tend to do so.	Accommodation of religion is constitutional, but establishment of religion clearly is unconstitutional.

Student Handout 2: *Lee v. Weisman*

In June 1989, Robert E. Lee, Principal of Nathan Bishop Middle School in Providence, Rhode Island, invited Rabbi Leslie Gutterman to deliver the invocation and benediction at the graduation ceremony to be held that month. This action was consistent with the school board policy permitting principals to invite members of the clergy to give invocations and benedictions at middle and high school graduation ceremonies. As with all clergy, Rabbi Gutterman was provided with a pamphlet entitled "Guidelines for Civic Occasions," which contains recommendations for prayers at nonreligious civic ceremonies. The prayer delivered at the invocation and benediction began with God, made numerous references to God, and ended with *amen*.

Daniel Weisman, the father of soon-to-be graduate Deborah, objected to the invocation and benediction. He believed he had good reason to be concerned. Three years before, when he had attended his older daughter's graduation from the same school, a Baptist minister had presided over the invocation and benediction. The minister had enthusiastically led the audience in prayers and ended the program by having the audience stand in a moment of silence to give thanks to Jesus Christ. Weisman, who was Jewish, had felt terribly uncomfortable and thought it was inappropriate for a public school to sponsor such a prayer.

Afterward, Weisman wrote a letter of complaint to school officials, but he received no response. When it came time for Deborah to graduate, he decided to renew his complaint. After a series of letters and calls, and a meeting with Principal Lee, Weisman was told that, since a rabbi would be giving the invocation and benediction at the ceremony, Weisman should not be disturbed.

Believing that the school was violating the First Amendment, Weisman filed a motion for a temporary restraining order in U.S. District Court four days before the graduation ceremony. Specifically, he thought the school was sponsoring religion and that it was violating the separation of church and state because it was funded by public taxes and supported by state and local laws. Because of the short time left until the ceremony, the temporary restraining order was denied. The graduation program at Nathan Bishop Middle School took place, and Rabbi Gutterman delivered these prayers:

INVOCATION

God of the Free, Hope of the Brave:

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to guard it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America, in which all its citizens may participate, for its court system where all may seek justice, we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

Amen.

BENEDICTION

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

The graduates now need strength and guidance for the future; help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

Amen.

One month later, Weisman sought a permanent injunction against prayer at all school district graduations. In court, school officials maintained (1) that the rabbi's message, rather than being a prayer, was inspirational and appropriate for the solemn and important event; (2) that, for a prayer to violate the Establishment Clause, students would have to be coerced into praying; (3) that attendance at graduation ceremonies is voluntary and participants at the graduation could choose not to be there if they found prayer offensive; and (4) that prayers at civic occasions have a long history of acceptance in our country. Chaplains regularly say a prayer at the opening of state legislative sessions; in speeches before the nation, Presidents ask God for guidance; and even federal courts open with "God save the United States and this Honorable Court."

The U.S. District Court for Rhode Island granted the injunction. The court believed that reference to a deity constituted prayer at a public school graduation ceremony and thus was unconstitutional, as it violated the separation of church and state.

The U.S. Court of Appeals found that the graduation invocation and benediction had to meet three conditions to be ruled constitutional: (1) They must not have a religious purpose; (2) They must not advance or inhibit religion; and (3) They must not foster excessive government entanglement with religion.

The appeals court supported the district court ruling that the invocation and benediction were by nature religious and that they were prayers in that they invoked God over the proceedings and blessed them. The court ruled that the Providence schools in effect advanced religion in general by authorizing an appeal to a deity at a public graduation ceremony.

of the initial supporting facts, relevant constitutional and legal issues, and precedents.

- Have the courts write their decisions and deliver them to the class. Then identify which Justices' opinions are represented in the Student Handouts 3-6. Conduct a class discussion that compares the courts' decisions and arguments with those of the Supreme Court. Conclude by asking students what the implications of these opinions are for a continued wall of separation in general. And, specifically, how does this constitutional issue apply to prayer at public school graduation ceremonies?

6. Applying Supreme Court Precedents

Use the graduation prayer case below (1) to evaluate your students' knowledge about the Establishment Clause and recent Supreme Court precedents about prayer at public school graduations and (2) to develop their logical reasoning abilities associated with applying knowledge to a new situation. Information for the case has been drawn from *Jones v. Clear Creek Independent School District*.

Distribute and have students read copies of the case. Then ask, is it constitutional for students to follow a school board policy that allows them to elect to have a graduation benediction and invocation?

Student-led Graduation Prayer

The Board of Education of Clear Creek Independent School District adopted a resolution permitting high school seniors to include a student-written and -led invocation and benediction at their graduation ceremony, if the majority of the senior class so votes. In the event students vote to have an invocation, it shall be nonsectarian and nonproselytizing and conducted by a student volunteer.

Student Handout 3: Justice A

The question before this Court is, can members of the clergy offer prayers as part of official public school graduation ceremonies and be consistent with the religion clauses of the First Amendment?

Public school officials are agents of the state. Specifically, Principal Lee decided that an invocation and benediction should be given, chose the clergyperson who delivered the prayers (Rabbi Gutterman), and controlled and directed the content of the prayers by giving the rabbi guidelines for nonsectarian prayers. This conflicts with a cornerstone principle of the Establishment Clause that it is not part of the business of the government to compose prayers for any group of people.

The First Amendment's religious clauses mean that religious beliefs are too precious to be controlled by the state. By design, the Constitution leaves the business of preserving and transmitting religious beliefs to private individuals and not the government. Religion is to be protected from government interference. A lesson from history teaches us that, if citizens are subjected to state-sponsored religious exercises, the state disavows its own duty to guard and respect the diversity of religious beliefs. Considering the case before us, this lesson is particularly relevant. When these principles are applied to the present case, we find that prayer exercises in elementary and secondary schools carry a particular risk of indirect coercion from peers, teachers, and long-held community beliefs and traditions.

The Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise. In this case, the school's sponsorship and supervision of the graduation places public as well as peer pressure to stand during the invocation and benediction, and this may violate what a student believes, particularly if the person is of a different religion or a nonbeliever. This constitutes indirect and subtle pressure on students to participate. While the pressures may be indirect, their effects are still coercive, and this is prohibited by the Establishment Clause. The freedom of conscience of students needs to be protected from peer, school, and other pressures (coercion) that arise from this ceremonial occasion to participate in school-sponsored prayer exercises.

The petitioners have placed several arguments before the Court that I reject. First, some say that nonsectarian prayer at public ceremonies should be part of this country's civic religion and should be tolerated where sectarian prayers are not. This conflicts with the central meaning of the religious clauses of the First Amendment. The idea that government may establish a civic religion that is nonsectarian as a means of avoiding the establishment of religion is itself a contradiction, and this is not acceptable.

Second is the argument that prayer is like free speech, where all views can be heard by the individual. Therefore, religious dissenters should tolerate prayers at graduation just as public school students must learn to tolerate ideas that they disagree with in the classroom. This line of reasoning overlooks fundamental but different ways the First Amendment protects both speech and religion. Speech is protected by allowing its full expression and government participation; religion, by disallowing government intervention.

Third, some argue that the graduation exercises are voluntary, so that students who do not want to pray or who are offended by prayer do not have to attend. Hence, no coercion. This argument lacks all persuasion because law reaches past formalism. And to say a teenage student has a real choice not to attend her/his high school graduation is formalistic in the extreme. Everybody knows that in our society and in our culture high school graduation is one of life's most significant occasions. Attendance may not officially be required, but are students really free to be absent from their graduation? Absence from such an event amounts to giving up the intangible benefits which have motivated the student through youth and all her/his high school years.

Student Handout 4: Justice B

The Establishment Clause must be construed in light of the government policies of accommodation, acknowledgment, and support of religion that are an accepted part of our political and cultural heritage. Any interpretation of the Establishment Clause that would invalidate long-standing traditions cannot be a proper interpretation of the Clause.

I find it dangerous to interpret the Constitution on philosophical grounds because these views change over time and they cannot possibly give us an accurate view of what was intended by the Framers. This can only be revealed through the historic practices of our people. The history and tradition of our nation have numerous examples of public ceremonies featuring prayer of thanksgiving and petition. From our nation's origin, prayer has been a part of governmental ceremonies and actions. For example:

- The Declaration of Independence, the document marking our birth as a separate people, "appealed to the Supreme Judge of the world . . . " and vowed "a firm reliance on the protection of divine providence."
- George Washington swore his oath of office on a Bible and made prayer a part of his first official act as president: "it would be . . . improper to omit in this first official act my fervent supplications to that Almighty Being who rules the universe, who presides in the councils of nations . . . "
- Thomas Jefferson's prayer in his first inaugural address asked for guidance from "that Infinite Power which rules the destinies of the universe, our council to what is best . . . "
- James Madison, in his first inaugural address, placed his confidence "in the guardianship of the Almighty Being whose power regulates the destiny of nations . . . "
- The tradition of prayer at presidential inaugurations has continued to the present.

Two other branches of Government have a long-established practice of prayer at public events:

- The day after the First Amendment was proposed, Congress urged President Washington to proclaim a day of thanksgiving and prayer "to almighty God."
- Congressional sessions have opened with a chaplain's prayer ever since the First Congress.
- The Supreme Court opens its own sessions with the invocation "God save the United States and this Honorable Court"; it has done so since John Marshall's days.

Just as historic practices and understandings are the keys to interpreting the Establishment Clause, they play a key role in the case before us. The graduation ceremonies in Providence Public Schools that have invocations and benedictions are part of a long-standing American tradition of nonsectarian prayer to God at public celebrations. I believe prohibiting invocations and benedictions at public secondary school promotion and graduation exercises lays waste to a tradition that is as old as graduation ceremonies themselves. The first such ceremony took place in Connecticut in July 1868.

I reject the argument that students were coerced to participate in prayer by peer pressure and the social importance of the occasion. Certainly students who graduate from high school are of an age where they may assert their free will to sit and not participate in prayer while others stand and pray. That the record of this case has not shown that students were prevented from exercising their free will not to pray further weakens the argument that students were coerced to participate in prayer.

Even if all of this resulted in some form of psychological coercion, from a constitutional perspective it has no weight. Peer pressure coercion was not the kind of coercion the Establishment Clause was intended to prohibit. Rather, the Clause prohibits coercion brought about by state churches, financial support for churches by law, and threat of penalty for not attending by law. This Clause also prohibits state endorsement of sectarian religions.

Some have characterized the school official's actions as directing a formal religious exercise, and directing and controlling the content of Rabbi Gutterman's prayers. Nothing in the record remotely suggests that school officials ever drafted, edited, screened, or censored graduation prayers, or that Rabbi Gutterman was ever the mouthpiece of school officials. Rather, all the record shows is that Principal Lee, like other principals in Providence Public Schools, exercised his authority to invite a member of the clergy to deliver an invocation and benediction at graduation ceremonies, offered advice that the prayer should be nonsectarian, and gave the clergyperson a pamphlet from the National Conference of Christians and Jews that gave advice on prayers appropriate for civic occasions.

While this case brings many constitutional issues to the Court, practically speaking, public schools will be able to give invocations and benedictions next June as they have for a century and a half so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers. All that is needed is an announcement at the beginning of the graduation program, that while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so.

Public prayer is important to religious people of all faiths. To deprive our society of this unifying mechanism in order to spare a nonbeliever what is a minimal inconvenience of standing or sitting in respectful nonparticipation, is as senseless in policy as it is in law.

Student Handout 5: Justice C

One clear understanding has emerged from almost 50 years of Supreme Court interpretation of the Establishment Clause: Government may neither promote nor affiliate itself with any religious doctrine or organization.

Recent decisions of this Court have concluded: neither a state nor the federal government may pass laws that aid one religion or aid all religions. The First Amendment forbids the use of the power or the prestige of government to control, support or influence religious beliefs and practices

In every case involving religious activities and public schools, this Court has applied the *Lemon* test. Application of this test to the facts of this case are straightforward. There can be not doubt that the "invocation of God's blessings delivered at Nathan Bishop Middle School" is a religious activity. The nature of prayer has always been religious. The question is whether the government has placed its official stamp of approval on the prayer. The facts of the case indicate government approval. The school officials (government) composed the official prayers, selected a member of the clergy to deliver the prayers, had the prayers delivered at a public school event that was planned, supervised and given by school officials.

The Establishment Clause requires more than just the absence of coercion. It is not enough that the government does not compel people to practice religion; government must not engage in religious practices itself. In the present case, government (the public school) is attempting to convey a message that a religion or religious belief is favored or preferred. When government endorses a religion, it sends a message to nonbelievers that they are outsiders and not full members of the political community. Our government cannot be premised on the belief that all persons are created equal when it asserts God prefers some over others.

The separation of church and state protects religion as well as government. Religious freedom cannot exist without a free democratic government, and such a government cannot continue when there is a fusion of religion and political regime. Religious freedom cannot thrive in the absence of a vibrant religious community, and this community cannot prosper and grow when government endorses one religion over another. Therefore, this Court has prohibited government endorsement of religion whether or not citizens were coerced to conform.

Student Handout 6: Justice D

Forty-five years ago, this Court announced a basic principle of constitutional law from which it has not strayed—the Establishment Clause forbids government practices that aid all religions. Reaffirming that principle in this case forbids state-sponsored prayers in public school settings no matter how denominationally neutral the prayers may be.

Some have challenged this precedent by reading the Establishment Clause to permit government promotion of religion so long as the government does not prefer one religion or denomination over another. They assert that the original understanding of the Framers of the Establishment Clause did not require government neutrality between religion and irreligion, nor did it prohibit the government from providing nondiscriminatory aid to religion. While there may be some evidence to support this position, a more powerful and overwhelming argument against it lies in the analysis of the many drafts of the religion clauses in the First Amendment which indicate that the Framers of the Establishment Clause intended to prohibit nonpreferential as well as preferential aid to religion.

While many of the early presidents offered inaugural and Thanksgiving Day addresses, they were not always consistent about religion. For example, Thomas Jefferson offered prayers at his inaugural addresses but refused to issue Thanksgiving proclamations of any kind because he thought they violated the religion clauses of the First Amendment. President Madison was inconsistent: sometimes he called for Thanksgiving Day prayers but later doubted their constitutionality. My reading of history, then, suggests that history neither contradicts nor supports reconsideration of whether the Establishment Clause forbids government support of any one or all types of religion.

It is further argued by those who want government to accommodate religion that government should be able to support nondenominational religion. I find this idea to be highly problematic, as government would have to investigate which religious practices would be permissible and which practices would not. To determine these would engage the Court in comparative theology, a practice that would entangle government with religion.

Accommodation does not mean that government may sponsor prayers. It is only appropriate when government lifts a law or practice that has served as a barrier or burden to the free exercise of religion. This type of accommodation was provided when the Court freed Amish children from some of the compulsory education laws.

It has been argued that government may sponsor religious belief as long as it does not coerce support for religion or participation in religious exercises. I believe that this approach to coercion would require us to abandon our settled law. Numerous court decisions, for years, have declared unconstitutional many noncoercive state laws and practices that convey the message of religious endorsement. Under the coercion test, it is unconstitutional for public school officials to be involved with prayers where students are induced to participate through public or peer pressure.

When public school officials convey that they endorse religion to their students, they strike near the core of the Establishment Clause. No matter how ceremonial their message may be, they are flatly unconstitutional.

Student Handout 7: Expert Questions for the Justices

Justice A

1. What is the Justice's opinion about the relationship between government and religion? Why is it important to protect religion from government, and government from religion?
2. What does the Justice say about coercion and students' freedom of choice to attend and participate in graduation exercises that have invocations and benedictions?
3. What differences does the Justice note between freedom of religion and freedom of speech in civic ceremonies like high school graduations?
4. What does the Justice think about nonsectarian prayers being offered at civic and public ceremonies like graduations?
5. What arguments before the Court does the Justice reject? Why?

Justice B

1. What is the Justice's opinion about the relationship between government and religion? May government accommodate and acknowledge religion?
2. What is the Justice's viewpoint about the relationship of long-standing American traditions and an accurate interpretation of the Establishment Clause?
3. According to the Justice, are invocations and benedictions at public high school graduation ceremonies inconsistent with what was intended by the Establishment Clause?
4. What is the Justice's viewpoint regarding coercion? According the Justice, were students coerced to engage in prayer at the graduation ceremony?
5. What advice does the Justice offer school officials who want to hold future graduation ceremonies with invocations and benedictions?

Justice C

1. According to the Justice, what is the clear understanding that has emerged from over 50 years of U.S. Supreme Court interpretations of the Establishment Clause?
2. What is the Justice's viewpoint about the results of the application of the *Lemon* test in this case? Did the government place its stamp of approval on prayer?
3. What types of coercion does the Justice view as prohibited by the Establishment Clause? Was coercion a factor in the present case?
4. According to the Justice, how does the separation of church and state protect both religion and government?
5. What does the Justice say about the relationship between a free democratic society and religious freedom?

Justice D

1. What is the Justice's viewpoint on the relationship between government and religion? on government accommodation of religion?
2. According to the Justice, may government promote religion if it doesn't discriminate among religions, or must government always be neutral in religious matters?
3. What does the Justice say about the role of traditional American practices that give meaning to the Establishment Clause?
4. What arguments does the Justice reject? Why?
5. According to the Justice, were students coerced into participating in high school graduation prayer in this case?

Brown v. Boa

A Pictorial History of Pu

As narrated by

Margaret Bush Wilson

Chair of the American Bar Association Special Committee on Youth Education for Citizenship

In May 1954, when the U.S. Supreme Court handed down its momentous decision to desegregate public schools in *Brown v. Board of Education of Topeka*, Margaret Bush Wilson was a young attorney and mother living at her parents' home in St. Louis with her husband and four-year-old son. No one knew that she was to become nine-term Board Chair of the National Association for the Advancement of Colored People (NAACP), nor that the Supreme Court was about to strike down *Plessy v. Ferguson*, the 1896 Court decision which held that the doctrine of "separate but equal" in public facilities was constitutional. Now, to commemorate the 40th anniversary of that historic milestone in this nation's quest to live up to its creed, Mrs. Wilson shares with us her perspectives on the case, as a "private" and a "public" citizen who has devoted her professional life to the advancement of equality in our nation.

In talking about *Brown v. Board of Education of Topeka*, it's helpful first to look at the civil rights climate in 1954 and the years immediately before the case was decided. During World War II, nearly 1 million black Americans had served in the U.S. armed forces, mostly in segregated units. Many had served with honor. Benjamin O. Davis had become the first black brigadier general in the U.S. Army. Desegregation of the armed forces had begun on a trial basis, and it became permanent in 1948. Just prior to that, in 1947, Jackie Robinson of the Brooklyn Dodgers had become the first black major league baseball player, helping to break down racial barriers in sports.

Dwight D. Eisenhower was president. Harry S Truman had just stepped down after having been elected in 1948, to the astonishment of everybody but the people who had voted for him. That's an interesting story because Harry Truman was reelected, in great part, because of the black vote. President Truman was from Missouri, where I lived. Some very significant things happened in 1948 that reflected President Truman's sensitivity to the issues involving *Brown*.

Even though discrimination prevented many blacks from getting work back in those days, interestingly enough, the major problem that many African Americans faced was housing, not unemployment.

By the early forties, during World War II, African Americans had begun to

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lic School Desegregation

improve themselves economically and educationally. More and more were registering to vote, and about a million Southern African Americans had moved to the North seeking defense-related jobs in industrial cities. In major urban areas where there were substantial numbers of black people, however, property was covered by restrictive covenants, which were individual property owner agreements that the owner would not sell, rent, or lease the property to people on lists that included African Americans, Jews, and other racial and ethnic minorities. These covenants were written and recorded, and they ran with the land. Anybody who bought the property after the covenant had been recorded was subject to the agreement.

African Americans were hard pressed for decent places to live, and there was a strong effort by the NAACP to break these covenants. Since 1927, the Supreme Court's position had been that it would not deal with private agreements between individuals.

The effect was a very, very unhappy situation all around the country, particularly in the black communities in Detroit, St. Louis, Washington, D.C., and other places where these covenants were really hemming people in. Those of us who were trying to get our people decent housing were very frustrated, and that's where this whole thing began to boil. As the NAACP tried to figure out what to do, it continued to file suits. In some cases it won, and in others it lost. Finally, in 1946, a suit was filed in St. Louis against the J. D. Shelleys, a black family who had bought their home without being aware of the restrictive covenant on the property. The Shelleys won their suit before a lower court, and everybody thought that was the end of it. But the people who had sued them appealed to the Missouri Supreme Court,

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Sign of the times in Macon, Georgia, 1950s (top); *New Brooklyn Dodger Jackie Robinson, 1947* (bottom).

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Harry S Truman with Sen. Tom Hennings, 1950 (top); *"Separate-but-equal" facilities* (middle, bottom).

which overruled the lower court and ordered the Shelleys to move. That's when local people raised their voices, including James T. Bush, Sr., my father, who was the real estate broker instrumental in getting the Shelleys their house. They decided to organize and take the case to the Supreme Court.

But, before that case was over, something unprecedented happened. For the first time in anyone's memory, the U.S. government entered as a friend of the court, on the side of the Shelleys: the first civil rights case involving private citizens, I think, where the government had ever done so. There's a very interesting story about why the government did this, and I have my own theory. Missouri had a dynamic senator named Tom Hennings. He and the president were very close. Hennings was also very close to some leaders in the black community in those years, who I am sure briefed him on this case and urged him to persuade the president to support it. I think this combination of factors ended up with the solicitor general's filing the court amicus brief on behalf of the government, in support of outlawing racially restrictive covenants.

Once the case had been heard, we knew that a decision was coming. But we had no idea what it was going to be. The problem was that only six, not nine, Justices had appeared to hear the case. The other three had recused and excused themselves. That meant that the NAACP needed five of the remaining six votes, or we lost. It was high drama. The lawyers scrambled to get profiles on the six remaining Justices to see how to craft their arguments. The fact that those three Justices had stepped aside just blew us away. There was no way of knowing how many votes we could get out of the Court—no way of getting any reading. And there wasn't any television—no news coverage of the type we're accustomed to now. All we had was the radio and decades of discrimination to ponder. In 1948, when the Supreme Court finally held that these restrictive covenants could not be enforced in the courts, we were elated. But first we had to overcome our complete surprise.

That was the civil rights climate as we moved uphill into the fifties. The housing problem was not solved, but it was relieved.

Now, what was the larger climate? World War II was over, and the Marshall Plan was starting. The Truman Doctrine and North Atlantic Treaty Organization were initiated. The white South African government came into power around that time; and, in the rest of Africa, there was a bubbling up of people seeking to be liberated from colonialism. That's the background against which we look at *Brown v. Board of Education*.

While the Shelley case did something about housing, *Plessy v. Ferguson* was still on the books. This infamous 1896 case, where the Supreme Court ruled it constitutional to have "separate-but-equal" facilities for whites and blacks, was still on the books. As long as that decision was part of the law of the land, every black person who had any sense of personal dignity would feel offended. I can remember, when I first understood what the decision meant, intellectually I could not believe it. It was appalling. How could this be when it contradicted the Constitution? It's very interesting how, despite the Civil War, and despite the Thirteenth, Fourteenth, and Fifteenth Amendments that followed, a majority of the Justices listened to the climate of their times and maintained it—even though the war and at least those amendments had set a framework for a different kind of way of life. There was still a lot of genuine hostility between the South and the North, and the South felt put upon. We African Americans were pawns.

Starting with Mr. Justice Harlan, who dissented in the *Plessy* case, people need to know that there are a lot of unsung heroes and heroines in the struggle to end racial segregation sanctioned by law and to desegregate the schools. When people hear the name *Thurgood Marshall*, they think of this stunning man who stood up to the Supreme Court and took on the best lawyers that the South could bring forward—and won. He was a hero, but behind Thurgood Marshall was the institution, and behind that institution was a cadre of ordinary people all over the country. Of course, I'm talking about the NAACP and its membership base.

The NAACP started out trying to desegregate schools by challenging segregation in Midwestern professional schools—especially law schools, such as those in Missouri and Oklahoma. The strategy was to start there because the nine Supreme Court Justices were all lawyers, and they should have been able to understand the contradiction of having a Constitution, a Bill of Rights, and the Thirteenth, Fourteenth, and Fifteenth Amendments coexisting with policies based on race, that barred state taxpayers from being educated in state-supported schools that were teaching about the law.

The NAACP's efforts to desegregate the schools had really started in the midthirties with the Lloyd Gaines case in Missouri, my home state. It went all the way to the Supreme Court. When Gaines finished Lincoln University in Jefferson City, he decided that he wanted to go to law school and applied to the University of Missouri. The university refused to admit him but agreed to pay his tuition so that he could go to any other institution he wished. Many black Missourians had done just that. Some had gone to Howard University in Washington, D.C., and some to the University of Michigan, for example—and they received a fine education paid by the state. An African American, then, could not be educated in Missouri but could come back to take the bar and practice there. What was the state gaining? There was nothing logical about this. It was simply a case of not letting black people in.

Lloyd Gaines did not want the state to pay his out-of-state tuition. He wanted to go to the law school in Missouri, and the state said no. In Missouri's entire history, only one black student had ever graduated from one of its law schools—that was from Washington University, a

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Educational facilities for blacks and whites, 1940s (top, middle); *Lloyd Gaines, 1936* (bottom).

private school in St. Louis. By the 1930s, however, that institution was closed to blacks as well, and there were no other professional schools open in Missouri or in Kentucky, Maryland, any of the other border states, or in any of the southern states.

In 1938, the Supreme Court ordered Missouri to admit Gaines or to provide a separate-but-equal educational facility for him. Well, there was no way the University of Missouri could have created a law school out of whole cloth by September of the coming school year, so everyone thought Gaines was going to go to the University of Missouri Law School. But something very strange happened. Lloyd Gaines disappeared, physically and literally. To this day, nobody knows where. No one ever filed a complaint about his disappearance. Even his family never raised a question. It was just a mystery. Of course, there are those who think that somebody got to him and just made it convenient for him to vanish.

What Gaines's disappearance did was to give the University of Missouri and the state legislature a whole year to create a law school for blacks in St. Louis—with a library, faculty, accreditation, the whole bit—and connect it with Lincoln University. It was called the Lincoln University School of Law. That's where I went to law school.

Other states didn't proactively establish law schools for African Americans in response to the Gaines decision. They had to be pushed even to do that, by suits the NAACP won. In most cases, the states complied. Soon Oklahoma, Texas, and Louisiana had opened law schools for blacks—all were state-tax-supported institutions with their own faculties, almost always composed of black instructors. Segregation was being maintained at a very high cost, and these states remained willing to pay.

The NAACP's next strategy was to look at black teachers' salaries compared to those of white teachers. This was a national scandal because there wasn't a single state where the pay was equal or even close. The basis of this discrimination was nothing but race, and there was no defense to the teacher equalization suits that the NAACP filed. But no one had yet frontally attacked the central issue that the separate-but-equal doctrine itself was wrong. That wouldn't happen until *Brown*.

By the late forties, the Supreme Court had ordered some segregated universities and colleges to admit African Americans, but it was an accepted practice to make these students sit separately from the white students, sometimes in a different room. Then, in 1951, a black railroad worker named Oliver Brown sued the board of education of Topeka, Kansas, for not allowing his daughter Linda to attend the all-white Sumner Elementary School near her home. As a basis for demonstrating that the separate-but-equal doctrine was unfair and discriminatory, the NAACP's lawyers decided to go outside traditional approaches in preparing their court briefs and instead to talk about the sociological impact segregation had on citizens. Charles Houston, once the

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Lincoln University's new dormitory, 1939 (top); *court-ordered "integration" at University of Oklahoma, 1948* (middle); *Linda Brown, 1952* (bottom).

NAACP counsel, was the brains behind developing the brief for *Brown*, but Thurgood Marshall—his dazzling pupil—presented the legal argument and stood in the limelight. Marshall, of course, was later to become the first African American Supreme Court Justice.

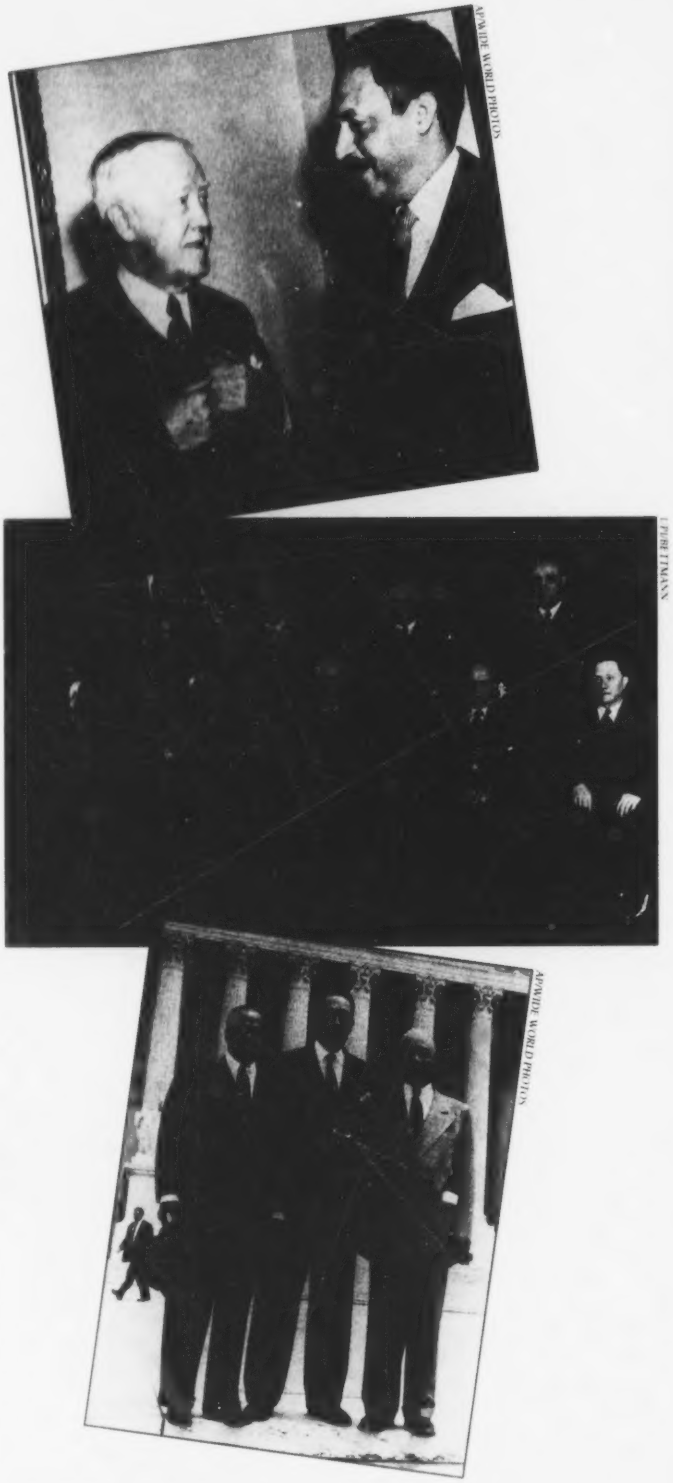
When *Brown* was decided on May 17, 1954, my son was four years old. I had been practicing in St. Louis with my husband since about 1947. Six years had passed since *Shelley*, and I remembered the excitement of all that. But it was nothing compared to the ecstasy we felt when the *Brown* decision came down.

I can remember that beautiful day in May. I was home for some reason, listening to the radio, when I heard it. The Supreme Court had ruled that racial segregation in schools was a violation of the Fourteenth Amendment and that segregated schools were "inherently unequal," depriving minorities of equal educational opportunities. Linda Brown was to enroll in Sumner.

What was the first thing my family did? We dashed to the phone and called everybody. We had more fun on the phone. And we sat around glued to the radio. Everybody came over—relatives, neighbors, everybody. We went running up and down. And the celebration just continued. When you've grown up under a system that is so ugly, and then have it transformed by a single court opinion, in a single day, it's breathtaking.

We were ecstatic and stunned about the unanimous 9-0 decision. As I look back and think about it, the only thing that bothered me was that the Supreme Court rendered the decision but delayed the remedy. I had never heard of that in the practice of law. As an attorney, I was completely flabbergasted. The phrase that I remember is "with all deliberate speed." The schools would be desegregated with all deliberate speed once the Court finally worked out the remedy. I had never heard that phrase used in any decision; I'd never heard it anywhere before. You know, it didn't take all day to segregate us; they just wrote a fiat. I wonder now, if the Court had not delayed and instead had ordered all the schools to open forthwith, would the South have gone into complete revolt? Would there have been chaos? I don't know. But, once the remedy was delayed, it took years for the South to accept desegregation, and some states used all kinds of tactics to get around it.

In St. Louis, I think an immediate remedy might have worked. The African Americans there lived in the center of the city—in the middle between the whites, who lived on either side to the north and south. We had recently built brand new schools all up and down this central corridor, presumably to keep the black children from going anywhere else. But it would have been a simple matter to integrate all those schools very quickly. Instead, we didn't start until 1955 and then did so in stages. I know because my son went to one of the first integrated schools. They integrated the kindergarten first, and then the other grades one by one. But, instead of using the schools sitting in the center of the city, they did all kinds of strange



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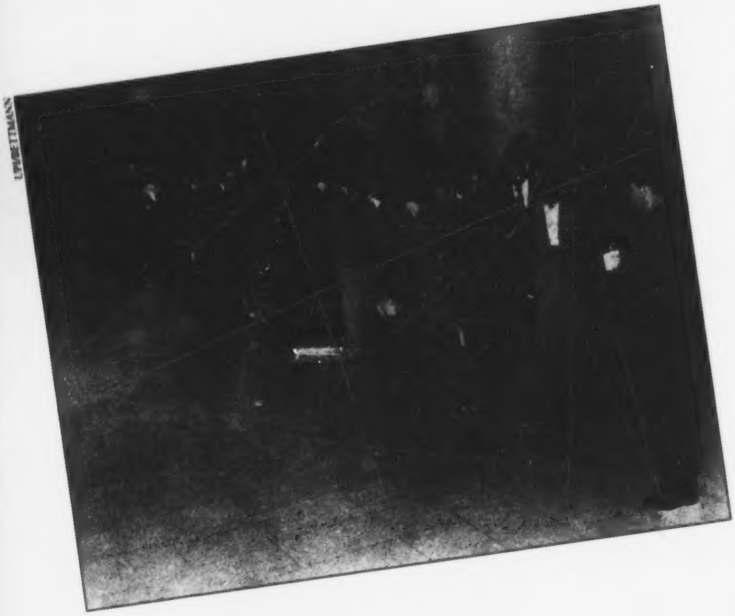
Opposing counsel in Brown, 1952 (*left, John W. Davis, right, Thurgood Marshall*) (top); *U.S. Supreme Court, 1954* (*front row, left to right: Frankfurter, Black, Warren, Reed, Douglas; back row: Clark, Jackson, Burton, Minton*) (middle); *Victorious* Brown *attorneys outside Supreme Court, May 17, 1954* (*left to right: George E. C. Hayes, Thurgood Marshall, James M. Nabrit*) (bottom).



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A cadre of ordinary, concerned people wait to hear Brown *at Supreme Court, 1953* (top); *After the decision, they waited for the remedy* (bottom).

things to keep most of them all black. So, we had integrated schools on the edges, but not full integration.

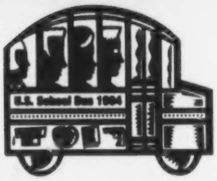
Even today, there are substantial numbers of schools that are predominantly white or black. This may be because of neighborhood patterns or shifting populations; yet, I think there is an enormous value when young people get to know young people who are different from them. When I look back on my own schooling, which was entirely segregated, I can say that I received a marvelous education. My teachers were African Americans who went to universities and had fine degrees but couldn't get jobs in the larger communities. So they came back with Ph.D.'s to teach high school. My education was so insulated, I didn't really know how I stacked up against others intellectually or academically until after I finished law school and took a federal civil service exam for lawyers. Not only did I pass, but I ended up in the top three. The agency invited me for an interview and I was hired. And that was before affirmative action.

On the other hand, I can see a place for today's efforts by African Americans and other minorities to establish their own vehicle for preserving and teaching their culture and heritage. If educational institutions had, as a matter of course, included other than European heritage, culture, and contributions in mainstream education, there would be no need for these demands. I'm heartsick that we're going into the twenty-first century with so many racial problems unresolved.

This country has a potential for incredible greatness. A lot of my life and time has been given to opening doors and getting the momentum going for change. One of the things that I think it is essential to understand is that all of us in this country are two persons: a private person and a public person. This isn't being taught to our children early enough. If somebody had told me in the sixties that we would have the problems we have today with drugs and guns, I would not have believed it.

Most of us function primarily as private persons. When we do function publicly, we have to be concerned not just about voting but about maintaining the community and the commonweal—not just once in a while, but all the time. I know that I'm two persons, and I'm constantly finding myself reacting as a public person by doing something that I really don't have to do; but I know that if I do it, things will be better for a whole lot of people.

The one thing I would ask of teachers and parents is to instill this precept in our youngsters at an early age so that they will begin to look beyond their personal needs and do something for somebody besides themselves. A lot of our problems would come into proper focus if people stopped functioning as if they had no responsibility to anybody but themselves—if we had an expanded cadre of ordinary people committed to maintaining the commonweal. Can you imagine how exciting it would be in this country today if we had a critical mass of people standing up against drugs and violence as people did against racial segregation 40 years ago! ☐



Sexual Harassment in Schools

Ralph D. Mawdsley

I. Perspectives on the Law

A look at important legal principles and precedents that have framed sexual harassment law

In *Education Week* (February 1993), a California state senator described sexual harassment as "a dirty little secret that's been around for a long time . . . something we've kind of accepted." Sexual harassment began receiving judicial attention as a serious societal issue in the 1980s, but it didn't seem to become a matter of major public interest until the media aired Anita Hill's sexual harassment charges against Justice Clarence Thomas during his confirmation hearings in 1991. Today, the emerging body of sexual harassment law clearly indicates that employees will no longer tolerate sexual misconduct at work—and neither will students, whether on school premises or at school activities.

Students, like workers, are entitled to personal dignity. Courts have been consistently supportive of school district efforts to dismiss employees found to have engaged in sexual misconduct, even when it involved no more than writing love letters to students. Part of engendering respect for individuals is identifying, addressing, and removing all forms of sexual misconduct.

The law has armed students with various causes of action in torts, as well as an arsenal of statutory remedies, some of which are described below. Among other penalties, it is hoped that the threat of liability for financial damages will force school officials to address this major societal problem in the school context.

Early Harassment Cases

The first court cases dealing with sexual harassment involved employment settings where women alleged that employers had engaged in physical and nonphysical acts of sexual misconduct. Once courts determined that employers could be liable for money damages when supervisors sexually harassed employees, workers began to litigate whether employers could be liable when they failed to act in a reasonable manner to stop employee acts of sexual misconduct toward fellow employees.

A similar pattern has begun to develop in school cases. School administrators, teachers, and staff have been found liable for acts of sexual harassment that they themselves committed against students; but students also have begun to litigate the issue of whether school administrators and school boards should likewise be liable for their employee's sexual misconduct on the grounds that the school district negligently hired and retained sexually abusive staff members or inadequately supervised them. And liability in the schools has now gone beyond these issues to whether school officials should be liable for sexual harassment by students against students.

Quid Pro Quo & "Hostile Environment"

When Title VII was interpreted, the EEOC regulations became important because they raised two distinct grounds for alleging sexual harassment: *quid pro quo* (sexual demands made in exchange for an employment benefit) and what has become known as "hostile environment." In the seminal case of *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986), the Supreme Court determined that both were grounds for sexual harassment. In *Meritor*, a female bank employee who was fired brought suit against the bank under Title VII for sexual harassment based on her supervisor's demands for sex, to which she had acquiesced for fear of losing her job.

The employee's complaint alleged not only that her employment was conditioned on sexual participation, but that the supervisor's behavior created a hostile work environment. A unanimous Supreme Court agreed with the employee that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex." The Court further observed that "a claim of 'hostile environment' sex discrimination is actionable under Title VII."

Ralph D. Mawdsley, J.D., Ph.D., is professor and chair of the Department of Counseling, Administration, Supervision, and Adult Learning at Cleveland State University in Ohio. Dr. Mawdsley has served as a school superintendent and as a university legal counsel.

Statutes and Regulations

Most of the recent legal development in the remediation of sexual harassment has resulted from judicial interpretation of two older federal statutes: Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-2], which deals with virtually all employees in public and private employment, and Title IX of the Education Amendments of 1972 [20 U.S.C. § 1681(a)], which deals with both employees and students in educational settings. Quoting the language of these statutes is important because, in determining remedies for sexual harassment, courts must operate within the limitations of statutory expression and legislative intent.

Title VII

Title VII provides that it is unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The Equal Employment Opportunity Commission (EEOC), which has the responsibility of enforcing Title VII, identified three categories of sexually harassing conduct:

> Unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature constitute sexual harassment when:
>
> (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
>
> (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
>
> (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Title IX

Title IX bars discrimination in educational programs receiving federal funds administered by the U.S. Department of Education:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

The Office of Civil Rights of the United States Department of Education (OCR), which has the responsibility of enacting interpretive regulations and enforcing Title IX, has defined sexual harassment as:

> Verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX.

Subsequent to *Meritor*, state and federal courts found that conduct such as fondling or touching, verbal abuse, display of pornography in the work place, or perpetuation of sexual stereotypes constituted sexual harassment, even though such conduct may not have been overtly sexual. This opened the door for employees to sue employers for conduct that was sexually offensive even when no employment benefits were involved. In *Comeau v. Board of Education of the Ballston Spa Central School District*, 160 A.D.2d 1150 (1990), a school district's female transportation employees had hostile work environment claims against the district when a male supervisor frequently used vulgar language, told sexual jokes around the garage, regularly patted or attempted to pat the women on their buttocks, and, on more than one occasion, touched their breasts.

Courts have tended to find that, while a single act may be sufficient to support a *quid pro quo* claim, it may be insufficient to prove a hostile environment claim. A determination as to whether conduct creates a hostile environment depends on whether the conduct was unwelcome, severe, or pervasive and whether the complainant, based on personal conduct, dress, and language, could reasonably have been offended by the alleged harassing conduct. In *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993), a unanimous Supreme Court recently clarified the applicable standard regarding what constitutes a hostile work environment, making it easier for plaintiffs to succeed in sexual harassment claims. The Court found that suffering serious psychological harm or injury was not necessary to support these claims. Rather, all that is needed is that the employee perceives the environment as hostile or abusive, and that a reasonable person would agree.

Responses to Student Claims

Unfortunately, school districts have not always been responsive to student complaints alleging sexual harassment. Some cases suggest that school districts at times may have been more concerned about the reputation of a teacher charged with harassment than with conducting an investigation of a student complaint.

In *Stoneking v. Bradford Area School District*, 856 F.2d 594 (3d. Cir. 1988), a high school band member alleged that the band director, who had won numerous band competitions and enjoyed strong school district and other support, had coerced her through threats of reprisal and intimidation to engage in various sexual acts before and after her graduation. When she complained to administrators, she was told that it would be her word against the band director's and that she should not tell her parents. When she did, her father met with the administrators, who attempted to persuade him to drop the matter because no teacher would have behaved as his daughter alleged. The administrators had also dissuaded another student from acting on the complainant's behalf by pointing out that, if she persisted with her complaint, "she wouldn't look good." On an earlier occasion, when another student had complained about the band director's sexual harassment, an administrator had required her to recant her allegation in front of the band.

Stoneking, which was finally resolved out of court after ten years of litigation, may or may not represent the kind of response students who complain about sexual harassment will receive from school officials. But information gathered by the Project on Sexual Harassment in Schools at Wellesley College's Center for Research on Women indicates that student-complainants, who are mostly females, frequently find their complaints are not addressed in a serious, sensitive, and responsive manner for reasons suggested in *Stoneking*.

School District Liability

Laws protecting against sexual harassment in the work place continue to have a salutary effect in educational settings. In *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028 (1992), a unanimous Supreme Court held that, when a teacher was alleged to have harassed a student by forcible kissing on the mouth, placing calls to the student's home requesting social meetings, and coerced sexual intercourse, money damages would be available to the student under Title IX for virtually all forms of this type of misconduct. More important, the student could recover against the school district and its supervisors because, although she had complained to school administrators, they took no action to put a stop to the harassment and discouraged the student from pressing charges.

Franklin's impact is significant. The Court has clearly determined not only that the term *sex* in Title IX refers to sexual harassment, but, by granting the student damages, it has also imposed on the school district a significant financial incentive for addressing the offense whenever it occurs in its schools.

Generally, any recovery from school officials or districts will be predicated on some degree of knowledge by the officials concerning the alleged sexual harassment. While the most certain way to have this knowledge is for the student to make a complaint to a teacher or administrator, the information might also be inferred from rumors circulating about the school that identify employees or students who have allegedly engaged in harassing conduct.

Some of the most painful harassment can come from a student's own peers. In February 1993, OCR reported in *Education Week* that, among the 40 sexual harassment cases it was investigating, two alleged peer harassment of elementary-age students on school buses. As with employees, student harassment can range from oral or written comments, taunts and jokes, bathroom graffiti, pinching, and grabbing to obvious physical assaults including rape or attempted rape.

Safe Environment Maintenance

Schools can be held responsible for maintaining an environment that is safe from sexual harassment. The same issue of *Education Week* reported that, in 1991, a Duluth, Minnesota, student was awarded a $15,000 settlement by the state human rights commission for "alleged mental anguish and suffering" because the school district had failed to remove sexually explicit graffiti about her in the boys' bathroom, despite repeated requests

New Development!

Principal Held Liable in Student Molestation

Students not only have a constitutional right not to be sexually molested by their teachers, but principals and superintendents can be held liable for the misconduct if they have shown "deliberate indifference," a federal appeals court has ruled.

In *Doe v. Taylor Independent School District*, Fifth U.S. Circuit Court of Appeals, New Orleans, 90-8431 (1994), a principal allegedly failed to warn or discipline a sports coach who had a sexual relationship with a 15-year-old student for several months. The coach, who finally resigned, was later convicted on criminal charges related to the girl's molestation.

The ruling that the principal could be sued for inaction was one of the first appellate decisions allowing such litigation against a school official. In handing down the verdict, the court said, "If the Constitution protects a schoolchild against being tied to a chair or against arbitrary paddlings, then surely the Constitution protects a schoolchild from physical sexual abuse."

Judge Will Garwood gave the dissenting opinion, calling the principal "indecisive, insensitive, inattentive, incompetent, stupid and weak-kneed," but stating that the school official had no constitutional duty to take more action. Five judges joined Judge Garwood in saying that sexual abuse didn't clearly occur because the student may have been mature enough to have consented freely.

to do so. In 1992, a student at Kenilworth Junior High School in northern California won an out-of-court settlement for $20,000 from the school district's insurance company because she had been unhappy with the way the school officials had handled her complaint about boys "mooing" at her and making comments about her breasts.

What these cases suggest is that sexual harassment is defined by the victim; if an individual finds the comments or physical activity to be unwelcome, then the behavior could be construed as harassment. School officials can no longer dismiss student harassment complaints with responses such as "kids will be kids."

In *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364 (1992), two girls who had been repeatedly sexually molested in a unisex bathroom attached to a graphic arts classroom were unsuccessful in their lawsuit alleging that the school district had been deliberately indifferent in not providing adequate supervision to protect them from harm. In this case, the girls had claimed that school officials knew or should have known that the molestation was taking place, even though the students had not complained to school personnel. The court refused to find liability for the school district where no school employees had witnessed the conduct or were aware that it had taken place.

D.R. raises the difficult question of whether a school district, which can be liable for failing to address a complaint of sexual harassment once it has been made, should also be liable where more school personnel supervision may have prevented the sexual harassment from occurring.

The clear message of both *Stoneking* and *D. R.* is that school officials and boards may not be liable for sexual molestation of students by employees and other students in all situations, especially where there is no knowledge of the harassment. But, if a student does complain to school officials, they will not only have a duty to investigate but also to provide effective remedies for sexual misconduct that is found to have occurred.

II. School Policy Development and Implementation

A policy outline to support lessons that give insight into preventive law, which all responsible organizations practice

Because students are in school, in part, because the state has mandated compulsory attendance, school districts should have some measure of affirmative responsibility to protect students when district officials know that the students' physical and mental safety are threatened. Four broad categories seem appropriate for prudent school districts to address in developing an effective policy for dealing with sexual harassment: ensuring the quality of the policy itself; educating students and school personnel about the policy; facilitating the proper report and investigation of sexual harassment charges; and formulating appropriate decision and remedies.

An Effective Policy

In the accompanying article on sexual harassment law, one apparent fact in *Franklin* (see "School District Liability") is that the school district had no formal policy or procedure for handling sexual harassment charges. In developing a school environment that is safe for students and employees, school districts should design and publish policies that include these features:

1. The policy should state that it applies to all persons in the school, including students, teachers, administrators, and staff, and that the policy will be interpreted in a manner that is consistent with the terms of state law and collective bargaining agreements.
2. The policy should identify kinds of conduct that will be considered unacceptable, including, but not limited to, physical contact, oral and written words with sexual connotations, and personal oral and written communications that are unrelated to the school's educational function.
3. The policy should limit physical contact between school personnel and students to situations where safety or health are factors.
4. The policy should encourage students to report all violations of the school's sexual harassment policy to teachers or other officials.
5. The policy should assure students that all reports of sexual harassment will be actively and diligently investigated and that appropriate action will be taken consistent with legal requirements.
6. Finally, the policy should identify the range of penalties that may be invoked for students, faculty, administrators, or staff found to have engaged in acts that violate the policy.

Education

Teachers need to be warned about the policy and its consequences. They must also be included in the process of handling student complaints and receive in-service training to perform this function properly. By the same token, they need to inform and sensitize students regarding sexual harassment.

If a school has other serious problems, such as those involving weapons or drugs, methods might be sought to assure that sexual harassment does not become de-emphasized by comparison to these other problems. Sexual harassment can have immediate and long-term emotional and psychological effects that may not surface until years later.

Publicizing the Policy

Simply creating a policy will not be effective if the school district does not take steps each year to publicize it to all students and school personnel. The district may want to consider several approaches: a schoolwide assembly, a series of assemblies, or a student handbook distributed to each student at the beginning of the year are examples.

Training Teachers

School districts should conduct regular in-service training sessions for school personnel on school time. Besides clearly and unequivocally presenting the policy, these sessions should alert employees to school settings and situations where sexual harassment may occur and where constant supervision must be maintained. The sessions should further offer training in how to listen nonjudgmentally to student complaints; how to communicate them to the appropriate school official; and how to maintain confidentiality and avoid contributing to school rumors.

Investigation

The administrator's role in resolving conflict between students and school employees and between students and their peers is crucial. While adults in employment settings may be more likely in many situations to confront perpetrators and to file complaints, such assertive actions by students against teachers or by smaller/ younger students against larger/ older students may be less likely. School officials must make a sincere and reasonable effort to review each sexual harassment complaint.

Process

Although no specific steps for investigation are required, they should include:

- designating who will handle the complaint if no one is specified in the sexual harassment policy of the school
- contacting the complainant's parents as soon as possible
- acquiring the student's written accusation of sexual harassment
- acquiring the accused person's written response to the accusation
- orally interviewing each party as well as persons identified as witnesses for either party
- preparing a written report summarizing findings of fact
- if a violation has been found, including recommendations for penalties under the school's harassment policy

Privacy

School officials need to be circumspect in conducting the investigation, especially regarding the privacy rights of the parties involved. The investigation should be treated as a confidential matter involving no more persons than are reasonably necessary to ascertain the facts underlying the complaint. Harassment complaints will involve only a small group of persons; and, even though school officials cannot prevent rumors from circulating, they can take reasonable steps to keep from contributing to those rumors. An unbiased and fair investigation is an important consideration, both for the student and the employee. It is important to be aware that, just as a student (or employee) might have been sexually harassed, an employee could have been wrongfully charged. An employee who has been accused might be permitted to resign rather than go through the school's investigation process to determine whether sexual harassment has occurred.

Employee Rights

Accused employees must be provided with some form of hearing process that accords with school policy, collective bargaining agreements, state statutes, and constitutional law. At the very least, they have the right to present their side of the story, the right to introduce evidence and call witnesses, and the right to a fair and impartial hearing. Other rights that may be available are cross-examination of witnesses, the right to have counsel present, and the right to have a transcript of the hearing.

Decision and Remedies

Since a policy is no better than its enforcement, closure must be part of the complaint process. The interests of students, teachers, and administrators in addressing sexual harassment are not served unless a decision is reached on each student complaint.

School Liability: What Educators Should Know

Here is some important information that Charles Pagels, executive director of personnel for the Peoria, Illinois, Public Schools, recently gave principals during a convention session of the National Association of Secondary School Principals.

✔ A lack of sexual harassment complaints is a poor indication that sexual harassment is not occurring in your school.

✔ In sexual harassment situations, the law focuses on the impact the behavior had on the victim, not the intent of the harasser.

✔ If a complaint is filed, principals should be ready with copies of the district or school policy, training materials, and documentation about the facts of the incident and the steps the principal took in a follow-up investigation.

✔ Even when a victim requests no disciplinary action, principals should act because they may be held liable if another incident with a different victim occurs.

For more details from Pagel's speech, see Mary Massey, "Sexual Harassment: What the Principal Should Know," *NASSP NewsLeader* 41, no. 7 (March 1994): 5.

First Amendment Considerations

Certain school property remedies will obviously need to be invoked regardless of a complaint's outcome. For example, graffiti of a personally identifiable and sexually harassing nature must be removed promptly from school property. On the other hand, allegedly offensive items of a general and nonpersonal nature, such as cartoons posted on a bulletin board or comments published in the school newspaper, may invoke a First Amendment issue of free expression. Free expression issues concern not only the nature of the item alleged to be sexually harassing, but also the rights of the person who has displayed it. For example, questions may arise such as whether it makes a difference that the item is a posted local newspaper cartoon as opposed to a clearly visible and readable comment on a button worn by a school employee or student. What if the cartoon was drawn by another student and appeared in a newspaper published by the school's journalism class? Or what if an offensive item occurred in materials a teacher chose for instructional use?

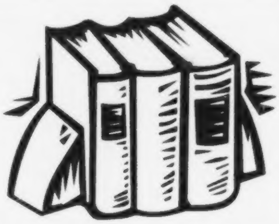
Remedies

As a form of assuming the responsibility to protect students from sexual misconduct, the school district must decide what remedy to seek when it has determined that sexual harassment has occurred. Remedy options include asking an employee to resign or seeking some form of disciplinary sanction. A school district's refusal to pursue a remedy because an offending employee or student has already experienced embarrassment and/or peer opprobrium may be seen as a failure to enforce the sexual harassment policy.

Those persons responsible for enforcing the school's sexual harassment policy must respond to basic questions like these in order to select which form of discipline or sanction to pursue against the offending person:

- Should verbal sexual harassment be penalized less severely than physical contact?
- Should teacher misconduct be treated more severely than the misconduct of a student?
- Should varying penalties be imposed based on level of responsibility, such as treating an administrator who did not react promptly to a student complaint as severely as the offending staff member?
- Should employees who have committed sexual harassment be permitted to resign rather than have some form of disciplinary sanction imposed against them?
- Does venue make a difference: should classroom misconduct be treated differently than hallway or school bus misconduct?
- Should age and grade level influence the penalty?

School authorities must finally determine who has authority to enforce the penalty. In most student misconduct cases, this will be school administrators and school boards. When employees are involved, school officials may have to bring charges pursuant to procedures outlined in collective bargaining agreements or state tenure statutes. ☐



Review!

Under 18 Under the Law

(1993). Videotape. Length: 84 minutes, in two parts; $5.00 (make check payable to Kentucky State Treasurer). (Kentucky LRE, Attn.: Deborah Williamson, Project Director, Administrative Office of the Courts, 100 Millcreek Park, Frankfort, KY 40601). Reviewed by Paula Nessel, project coordinator of the ABA National Law-Related Education Resource Center in Chicago, Illinois.

Produced for television broadcast to Kentucky classrooms on two successive days, this program is intended to acquaint middle and high school students with issues raised in the juvenile justice system. At the time of the broadcast, Kentucky court-designated workers visited each participating class to serve as resource persons.

The program begins with a brief reenactment of the landmark 1960s juvenile court case of Gerald Gault, compares the sentence Gault received to the sentence an adult would have received for the same crime, and asks the audience to decide whether Gault was treated fairly. The program incorporates several pauses for the students to write about or discuss issues raised by the Gault case and a series of four fictitious juvenile cases that follow. The role of the court-designated worker, the meaning of *diversion*, and the criteria for referral to diversion are described. Among the points raised for audience participation is whether each case is appropriate for a court decision or for diversion. The audience is asked to write diversion contracts where suitable to the cases portrayed.

While some aspects of the cases are specific to Kentucky, and the presence of a court-designated worker as a resource person is assumed, this videotape can be adapted to other situations. The pauses promote student participation in not only analyzing the issues of justice for juveniles but also in feeling the responsibility of passing judgment on plaintiffs their age who have been referred to the court for shoplifting, truancy, harassing communication, and criminal mischief. The program assists the student in not only becoming familiar with the juvenile justice system but also in feeling a connection to it.

Teaching Strategy

Understanding and Dealing with School Sexual Harassment

Aggie Alvez

Background

The statistics are numbing: 4 out of 5 students in grades 8-11 say that they have been sexually harassed. Two in 3 students report being harassed in the hallway, while more than half say the harassment has taken place in the classroom. And nearly 1 in 4 students who have suffered harassment say that, as a result, they do not want to attend school.

These findings from a 1993 survey commissioned by the American Association of University Women, "Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools," shocked an American public still struggling with the aftermath of the Clarence Thomas/Anita Hill episode. While most of the attention first focused on the behavior of adults in the work place, school administrators were beginning to confront an unsettling reality: students felt unsafe at school because of the pervasiveness of sexual harassment. School systems began to pay even closer attention after the U.S. Supreme Court ruled in 1992 that students who suffer sexual harassment can seek monetary damages from schools and school officials.

Increasingly, schools are implementing sexual harassment policies and guidelines for addressing complaints. Some, like the Montgomery County, Maryland, Public School System, are developing comprehensive measures to prevent sexual harassment. In Montgomery County, the school system has embarked on an ambitious plan to provide in-service training to all its 13,000-plus employees as well as a massive education campaign to reach all its students. Starting in elementary school, respect and appreciation for self and others will be emphasized as the foundation for appropriate social behavior. In addition, the superintendent has appointed a special Commission on Sexual Harassment in Education, comprised of community members, students, and staff, to review the school system's implementation of the policy.

Schools are recognizing that an essential component of any sexual harassment policy is **education for prevention.** The following lesson is an important beginning in helping teachers and students take a critical look at this important issue.

Objectives

As a result of this lesson, students will:

- define sexual harassment and cite the applicable laws for the work place and the school
- identify behaviors that may constitute sexual harassment
- describe the effects of sexual harassment on the victim, the harasser, and the school community
- cite procedures to follow if harassment occurs
- analyze scenarios and case studies to determine if sexual harassment took place and identify appropriate measures for preventing future harassment

Target Group: Secondary students

Time Needed: 5-7 class periods

Materials Needed: Student handouts 1-6

Procedures

1. Explain to the class that for the next couple of days you will be discussing sexual harassment. In order to give you an idea about their knowledge of the topic, distribute Student Handout 1, "What Do I Know About Sexual Harassment?" Ask students to complete the handout. Discuss the answers with them. Answers to Student Handout 1 appear at the end of these procedures.
2. Distribute and discuss Student Handout 2, "Sexual Harassment: The Law" and "Definition of Sexual Harassment."
3. Distribute Student Handout 3, "Is It Sexual Harassment?" Divide the class into groups of 3-5 students, and have each group assign a recorder/reporter to document and analyze the responses and report back to the class.
4. After discussing the answers to Student Handout 3, ask the groups to brainstorm a list of behaviors they think constitute flirting. Record their answers on the chalkboard/flip chart. Next, ask the groups to brainstorm a list of behaviors they think constitute sexual harassment. Record their answers on the chalkboard/flip chart. Possible answers to this exercise appear at the end of the lesson.
5. Ask the class to compare the answers on the lists. What are the major differences and similarities? What feelings are associated with flirting? with sexual harassment?

Aggie Alvez is the compliance officer for the Montgomery County Public Schools in Montgomery, Maryland, and formerly a program director with the National Institute for Citizen Education in the Law.

Can flirting turn into sexual harassment?

Note: Explain to students that flirting usually generates positive feelings for both parties, while sexual harassment invokes negative feelings in the party being harassed. Flirting involves some form of sexual attraction, while sexual harassment involves an abuse of power. The key question to ask in determining whether certain behavior constitutes sexual harassment is how does the alleged victim feel about the behavior? The law focuses on the behavior's *impact* on the victim, not on the harasser's *intent*. What may start out as flirting can cross the line if the person on the receiving end feels embarrassed, intimidated, or abused.

6. In light of this discussion, ask the students if any of them want to change the responses they gave in Student Handout 3. Next, ask the class to chart the scenarios from Handout 3 on a continuum from least offensive to most offensive types of behavior related to sexual harassment.
7. Divide the class into pairs, and ask each pair to generate a list of possible reasons why sexual harassment occurs. Record and discuss the responses. Possible answers appear below.
8. Assign each pair of students one of the factors cited in 7 above. Have them give specific examples and suggest some ways they might be countered.
9. Have the class as a whole generate a list of why victims are reluctant to report sexual harassment. Ask volunteers to organize this activity and prepare the final list. Possible responses appear at the end of the lesson.
10. Divide the class into groups of 3-5. Post the following categories on the chalkboard/flip chart: PHYSICAL EFFECTS, EMOTIONAL EFFECTS, SCHOOL PERFORMANCE. Ask the students to discuss ways that sexual harassment affects the victims in these three categories. Organize answers under their categories. Possible responses appear below.
11. Distribute and discuss Student Handout 4, "What to Do About Sexual Harassment." At this point, you and your class may want to review your school's sexual harassment policy and compare it to the handout. If your school has no policy, students can begin developing one to present to the administration.
12. Divide the class into small groups and distribute Student Handout 5, "Sexual Harassment Case Studies." Follow the directions on the student handout.

Suggested Follow-up Activities

Students can do a number of interdisciplinary activities that will allow them to take ownership of this issue and educate others in the school. To get the message out about sexual harassment, they can work with your school's language arts, art, drama, and communications departments, as well as the counselors, security unit, and media centers to:

- Develop an educational brochure
- Develop public service announcements (PSAs)
- Write, produce, and enact live or taped scenarios showing examples of sexual harassment and how to handle the incidents
- Create a bulletin board
- Sponsor Sexual Harassment Awareness Day/Week

Answer Keys

Student Handout 1: 1. **TRUE**—Title VII in work place and Title IX in schools; 2. **FALSE**—76% of boys in grades 8-12 say they've experienced sexual harassment; about 15-30% of men say they've been harassed in the work place; 3. **FALSE**—81%, or 4 in 5 students, say they've been harassed; 4. **TRUE**—Only 7% of students tell a teacher, while less than 5% of incidents are reported in the work place; 5. **FALSE**—79% of students are harassed by other students, while 25% of girls and 10% of boys have been harassed by a school employee; 6. **TRUE**—schools and school officials can be sued for damages; 7. **TRUE**—this can interfere with one's work performance or create a hostile environment; 8. **FALSE**—Of the 59% of students who say they've been harassers, 94% say they themselves have been harassed; 9. **FALSE**—Sexual harassment can occur if the conduct interferes with work performance or creates a hostile environment; 10. **FALSE**—The law protects the victim and focuses on how the victim is impacted, not on the harasser's intent.

Exercise 4: cat calls, whistling, sexual comments about one's personal appearance, clothing, or the like, neck massage, kissing sounds, howling sounds, smacking lips, licking lips, deliberate touching, leaning over, cornering, pinching, personal questions of a sexual nature, staring, sexually suggestive drawings, photos, or other visuals

Exercise 7: stereotyping, media influence in perpetuating stereotypes, attitudes toward women, "boys-will-be-boys" attitude, social norms, sexist language, lack of clear communication, failure to report harassment; little or no dialogue about it, no policies or procedures, little or no training and education, no consequences or penalties for offender

Exercise 9: fear of harasser/retaliation, embarrassment, peer pressure, feeling of helplessness or powerlessness, feeling that the complaint won't be taken seriously, lack of trust in the school, guilt about getting the harasser into trouble

Exercise 10: *Physical effects*: stress-related symptoms such as headaches, stomach pains, loss of sleep, fatigue, nervousness, weight loss or gain, drug or alcohol abuse; *Emotional effects*: depression, anxiety, fear, anger, shame, guilt; *School performance*: inability to concentrate, reluctance to come to school, decrease in self-esteem and motivation

Student Handout 1

What Do I Know About Sexual Harassment?

Directions: Circle *T* for true and *F* for false.

T F 1. Sexual harassment is a form of sex discrimination.

T F 2. Only females can suffer sexual harassment.

T F 3. Sexual harassment is primarily a problem of the work place, not the schools.

T F 4. Most victims of sexual harassment do not report it to a person in authority.

T F 5. Most of the sexual harassment that occurs in schools involves a teacher harassing a student.

T F 6. Schools can be held liable in cases involving sexual harassment between students.

T F 7. Posting nude pictures of men/women where they can easily be seen is a form of sexual harassment.

T F 8. Students who have been the victims of sexual harassment generally do not harass other students.

T F 9. Sexual harassment must involve some sort of *quid pro quo*—a benefit in exchange for sexual favors.

T F 10. If a person only intended to flirt, then the behavior cannot constitute sexual harassment.

Student Handout 2

I. Sexual Harassment: The Law

Sexual harassment is a form of sex discrimination under Title IX of the Educational Amendments of 1972 and under Title VII of the Civil Rights Act of 1964.

TITLE IX of the Educational Amendments of 1972 prohibits any person from being excluded from participating in, being denied the benefits of, or being subjected to discrimination on the basis of sex in any educational program receiving federal money. Title IX is enforced through the Office of Civil Rights (OCR) of the U.S. Department of Education, state departments of human rights, or private litigation

TITLE VII of the Civil Rights Act of 1964 protects public and private employees against discrimination with respect to compensation, terms, conditions, or privileges of employment based on race, color, religion, sex, or national origin. Title VII is enforced through the Equal Employment Opportunity Commission (EEOC) or state agencies.

The Civil Rights Act of 1991 allows victims of sexual harassment to recover compensatory and punitive damages from employers.

In ***Franklin v. Gwinnett County Public Schools*** (1992), the U.S. Supreme Court interprets the Civil Rights Act of 1991 so as to allow students who suffer sexual harassment and other forms of sex discrimination the right to seek monetary damages from schools and school officials.

II. Definition of Sexual Harassment

The federal Equal Employment Opportunity Commission defines sexual harassment as:

Any UNWELCOME sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature where:

1. Submission to such conduct is made, either explicitly or implicitly, a requirement of an individual's employment;
2. Submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual; or,
3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive environment in which to work.

The two types of sexual harassment are:

Quid pro quo, or conditioning professional or economic benefits on the exchange of sexual favors (see procedures 1 and 2 above).

Hostile environment, where there is no need to show economic harm (see procedure 2 above). This is the most common type of school sexual harassment.

Remember: The focus should be on the victim and determining whether or not s/he viewed the conduct as being unwelcome.

Student Handout 3

Is It Sexual Harassment?

Directions: Read the following situations. Circle Y for yes if you think the behavior constitutes sexual harassment. Circle N for no if you think it does not.

Y N 1. A male teacher refers to female students as "sweetie" and "baby doll."
Y N 2. A male student comments to a female classmate, "Nice dress."
Y N 3. A female teacher demands a hug from every male student who is late to her class.
Y N 4. It is common for seventh-grade boys to snap girls' bras.
Y N 5. Third-grade girls chase their male classmates around the playground and try to pull down their pants.
Y N 6. Boyfriend and girlfriend give each other a "peck on the lips" when they part in the hall to go to their separate classes.
Y N 7. During class, a male teacher rubs the backs of several of his female students.
Y N 8. A first-grade teacher hugs one of his female students when she comes crying to him with a skinned knee.
Y N 9. A ninth-grade male regularly tells one of his female classmates that she is "flat as a board." He tells another that her "breasts are a 10."
Y N 10. Boyfriend and girlfriend kiss and fondle each other in the hallway during change of classes.

Student Handout 4

What to Do About Sexual Harassment

1. **TALK!** Tell the harasser how you feel about the conduct, and communicate that you want the behavior to stop. Be firm and direct. If you feel uncomfortable saying this to the harasser, put your feelings in writing.
2. **REPORT!** If the behavior continues or if the first incident is serious in nature, report the harasser to a teacher, counselor, administrator, or any other adult in authority.
3. **DOCUMENT!** Put your story in writing. Include the following information: Who the harasser is, what the harasser did, when the incident(s) occurred, where it occurred, who the witnesses were, what you did/said in response, how the harasser reacted, how you felt about the incident.
4. **QUESTION!** Does your school have a sexual harassment policy? Do you have a copy of it? Do you know and understand what it says? Are the administrators handling your complaint according to the policy? Do you know the actions taken by the administrator in your case? What will the administrator do to ensure that the incident won't be repeated?
5. **REACH OUT!** Enlist the support of your family and friends, and talk to your school counselor or trusted adult in order to share your feelings about the incident. Don't blame yourself. If you feel that the school is unable to resolve the matter, you may contact: the school human relations office, the superintendent of schools, the county or state human relations office, the state department of education, or the U.S. Department of Education's Office of Civil Rights.

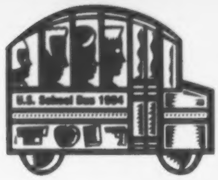
Student Handout 5

Sexual Harassment Case Studies

For each case study, answer these questions:

a. Is it sexual harassment? Why?
b. What steps should be taken?
c. What steps can be taken to prevent this from happening in the future?

1. Second-grader Tonya rides the bus home from school. Two boys in her class ride the same bus and regularly yell obscene words at her, tease her about her sex organs, and call her sexually derogatory names. She has come home in tears several times as a result of their conduct.
2. Ms. Fleming, a high school biology teacher, has recurring neck pains due to injuries she received in an automobile accident. During class, she often asks male students to massage her neck and shoulders.
3. Mark and his girlfriend Maria take a cooking class together at their high school. On several occasions, their classmates have seen them kissing, fondling, and rubbing up against each other. No one has complained to the teacher.
4. Shelly, a 10th grader, teased one of her classmates about his weight problem. While poking Keith in the stomach, she said, "You'd do well to lose some of this." In response, Keith poked Shelly in the chest and said, "You'd do well to grow some of these."
5. Mr. Smith, a high school custodian, frequently stares at female students as he approaches them. His eyes scan their bodies from top to bottom; and, when they pass, he watches them from behind.



Violence in Schools— Can We Make Them Safe Again?

An overview of the causes of school violence—and some directions to take in overcoming it

Carolyn Pereira

"School days, school days, good old golden rule days . . . " In 1940, the top school problems included talking out of turn, chewing gum, making noise, running in the halls, cutting into line, littering, and breaking the dress code. In a 1955-56 National Education Association poll, 95% of teachers described students as well-behaved.

By 1978, however, the National Institute of Education, in its report to Congress entitled "Violent Schools—Safe Schools," showed that school violence had become national in scope. By 1980, U.S. teachers identified drug abuse, alcohol abuse, pregnancy, suicide, rape, robbery, and assault as the top school problems. In 1992, the *Journal of the American Medical Association* revealed that the second leading cause of death for high-school-age children was being shot with a gun.

Not just people in large urban areas, but all of us have been inundated with statistics that cause concern about schoolchildren's safety. Illinois appears to be typical of the nation. According to a statewide survey conducted by the Illinois Criminal Justice Information Authority in May 1990:

- 1 in 4 students feared violence in school
- 1 in 5 students feared violence coming to and from school
- 1 in 12 students had been physically attacked

Carolyn Pereira is the executive director of the Constitutional Rights Foundation in Chicago.

In a recent interview with *Catalyst* magazine, Lt. Thomas Byrne, the head of the Chicago Police Department's new school patrol division, indicates that, not only are there more incidents, but they are more violent: "The days of *West Side Story* and fist fights are over. Now it's chains and brass knuckles and anything you can maim with."

The violence we are seeing in school reflects the increased violence in society. Once, our children were able to grow in safe communities in much the same way as eggs develop in their protective shells. But, as columnist Ellen Goodman asked in one of her recent articles, have our communities become our Humpty Dumpty? How can we keep him from falling off the wall? And, if he has already fallen, how can we put him back together again? It will certainly take more than all the king's horses and all the king's men.

This article will examine what are believed to be the causes of violence in communities and schools, how school boards and legislatures are responding, and, most important, what our prospects seem to be for the future of our schools.

What Causes School Violence?

In a recent survey conducted by the National School Boards Association, school superintendents from urban, suburban, and rural districts ranked family problems and the violence on television and in movies ahead of drugs, alcohol, guns, poverty, and racial tensions as the first and second causes for school violence. *Family problems* means more than divorced or poor families. Traditional and well-to-do households are also disintegrating. Often, in environments imbued with violence, abuse, and addiction, there is a lack of parental caring and supervision.

Television often portrays aggression as an appropriate, expected, normal behavior for solving problems and relieving frustrations. Students can easily get the impression that they may, and should, replicate that behavior. As the study said, "In an era when some children spend as many hours with Beavis and Butthead as they do with Mom and Dad, efforts to limit the amount of violence on television seem especially appropriate."

Although drug use is declining, alcohol abuse continues to rise. Sixty percent of murders involve alcohol. Both substances affect judgment.

More and more guns are finding their way into the hands of young people, with deadly results. According to the Illinois Criminal Justice Authority, one out of three children brings a weapon to school. Recently, a six-year-old brought a gun to a Chicago elementary school and, by accident or design, shot one of his classmates. If current trends continue, by the turn of the century, the chance of dying by a gunshot wound will surpass that of auto accidents.

Social conditions exacerbate the situation. Poverty, as well as racism, can lead to feelings of powerlessness, alienation, and anger. Unemployment is on the rise, and minorities appear to suffer disproportionately. Anger can turn into violent action, not necessarily directed at anyone or anything related to the source of the problems. These random acts of violence add to rising tensions in school as well as in the rest of society.

How Are Schools and States Responding?

Though schools by themselves are unable to correct the social conditions that breed violence, they cannot ignore them. How are they and state legislatures trying to do their part?

The 1993 National School Board Association's survey on how schools were responding to violence included 600 school districts representing urban, suburban, and rural areas. This survey reported that, of the 600 school districts:

- 78% use suspension
- 72% use expulsion
- 15% have metal detectors to screen for weapons
- 50% search student lockers
- 24% send dogs to search for drugs
- 61% use conflict resolution and peer mediation programs
- 43% use mentoring
- 39% conduct multicultural sensitivity training
- 38% provide parental skill training
- 39% have law-related education programs

According to a survey reported in *Education Law Reporter* (1993), several states have passed statutes designed to keep weapons away from schools and school functions, often increasing the penalties as they did during their "war on drugs." The laws vary in how "tough" they appear. In Illinois, possessing a weapon within 1,000 feet of school property is illegal. If minors (ages 14-16) are indicted for this violation, they will be automatically transferred from juvenile to criminal court. In Louisiana, students who possess weapons can spend up to five years imprisoned at hard labor. Students in Texas who possess weapons are expelled. Although California law allows for student expulsion for carrying a weapon on school grounds, students with written parental permission may actually carry weapons to school; however, California also has a parental responsibility law. Colorado's Zero Tolerance Law provides for automatic suspension or expulsion of students possessing a weapon on school grounds.

Although most of the legislation has been designed based on a get-tough attitude, a 1993 Illinois law mandates violence prevention education in every school—if the funds are available. It was passed without an accompanying appropriation. Nationally, only 6% of funds directed at violence are spent on violence prevention programs. We must consider whether this really is an appropriate allocation of funds.

What About Our Basic Freedoms?

Some of these school practices and laws may set us on a path that erodes a number of the basic freedoms guaranteed under the U.S. Constitution. Although suspensions and expulsions carry with them some basic due-process assurances, in practice there is actually far less protection for a student accused of a suspendible offense than for one accused of a crime. Metal detector or dog searches of a student or locker challenge Fourth Amendment guarantees of freedom from unreasonable search and government seizure.

Obviously, exceptions have always been made in times of emergency, and courts seem to have sanctioned many of these actions, realizing, at least in part, that individual freedoms are not possible if the larger community has fallen apart. Nevertheless, "get-tough" policies might result in unforeseen and unintended outcomes that undermine a commitment to some of our basic democratic values. As we develop programs to prevent and treat, they must be compatible with a democratic society. Our democracy cannot survive unless people are committed to the rule of law and the underlying values of the Constitution such as justice, equality, liberty, and due process.

What Makes Children Violent?

The American Psychological Association (1993) suggests that the causes of school violence are complicated and interrelated. They involve children's nature and nurturance; that is, the habits they develop as a result of the intersection of their biological traits and their surroundings. Some children are more at risk because of factors that include:

- an aggressive nature (perhaps due to an overabundance of the hormone testosterone)
- race (African-American males have a 1 in 27 chance of dying by interpersonal violence)
- gender (females have a greater chance of being abused)
- sexual orientation (gays and lesbians become victims of hate crimes)
- disabilities (handicapped children are targeted because of perceived vulnerability)
- intelligence (some children are unable to generate nonviolent options)

Ronald G. Slaby, senior scientist with the Education Development Center and lecturer at Harvard University, emphasizes the thinking habits of those involved in violence, including their lack of skill in problem solving and their inability to generate alternative solutions. Often, these children, who are generally impulsive, not reflective, believe that violence is an appropriate response.

As already mentioned, a dysfunctional family environment adds fuel to the fire. Child-abuse victims are more likely to become abusers themselves. School and community incidents can also help to foster behavior that is inappropriately aggressive (or passive) in response to violence. Gangs can present terrible options to children—for example, join them or do nothing to oppose them. When biologically at-risk children are growing up in a vio-

Associations to Contact

Here are contacts for more information about youth violence prevention:

National Education Association
1201 16th Street, NW
Washington, DC 20036
Contact: Richard Verdugo
202/822-7453

National School Boards Association
1680 Duke Street
Alexandria, VA 22314
Contact: Lynne Glassman
703/838-6702

lent environment that condones violence and/or consists of victims of violence, they are more likely to become violent, condone violence, or otherwise encourage victimization.

Violent children and victims are often rejected by conforming peers, do less well in school, and hang out with similar types, reinforcing negative behavior. Not only do these early behavior patterns interfere with success in school and positive peer relationships, but they have lifelong effects.

What Protects Children from Violence?

Obviously, not all children who come from dysfunctional families or who attend violent schools become involved with violence. Bonnie Benard, a prevention specialist for the Western Center for Drug-Free Schools and Communities at Far West Laboratory for Educational Research and Development, describes characteristics that can protect a child from the environment. Unlikely to become involved with violence are socially competent children with problem-solving skills and a positive sense of self. Social competence includes concern for others, good interpersonal skills, and a sense of humor. Effective problem-solving skills include being able to understand rules and the reasons for them and evaluate a number of alternative solutions to frustrating situations. A positive sense of self includes confidence in one's ability to work out problems.

What Can Adults Do?

Families, communities, and schools can help children develop the characteristics outlined by Bonnie Benard and thereby alter children's potentially violent responses. Tim Buzzell (1992) has suggested that protecting children from aggressive behavior means providing them with:

- a sense of community—caring and support from a group of adults with whom the children can form significant bonds
- a structure of clear and consistent expectations about nonviolent behavior
- opportunities for children to take control of their lives, gradually gaining more and more autonomy

David Hawkins's social development strategy (1992) identifies bonding—the feeling of being connected to others who act prosocially—as most important in healthy behavior development. To overcome the effects of a dysfunctional family, a child might develop strong bonds with a nonviolent group if three conditions are met:

- the child is given opportunities to contribute to the group
- the child has the skills needed to contribute
- the child's contributions are consistently recognized

What Are Our Prospects for Safe Schools?

In light of these theories, it is important to consider how effective the courses of action reported by the National Association of School Boards might be. They can be categorized into deterrence, prevention, and treatment categories.

Deterrence

Five of the courses of action reported—suspension, expulsion, metal detectors, locker searches, and dog searches—attempt to treat the symptoms. They send a clear message to students that weapons and drugs are unacceptable at school. The punishments reinforce the message. This is consistent with Buzzell's theory that children need a structure of clear and consistent expectations about nonviolent behavior.

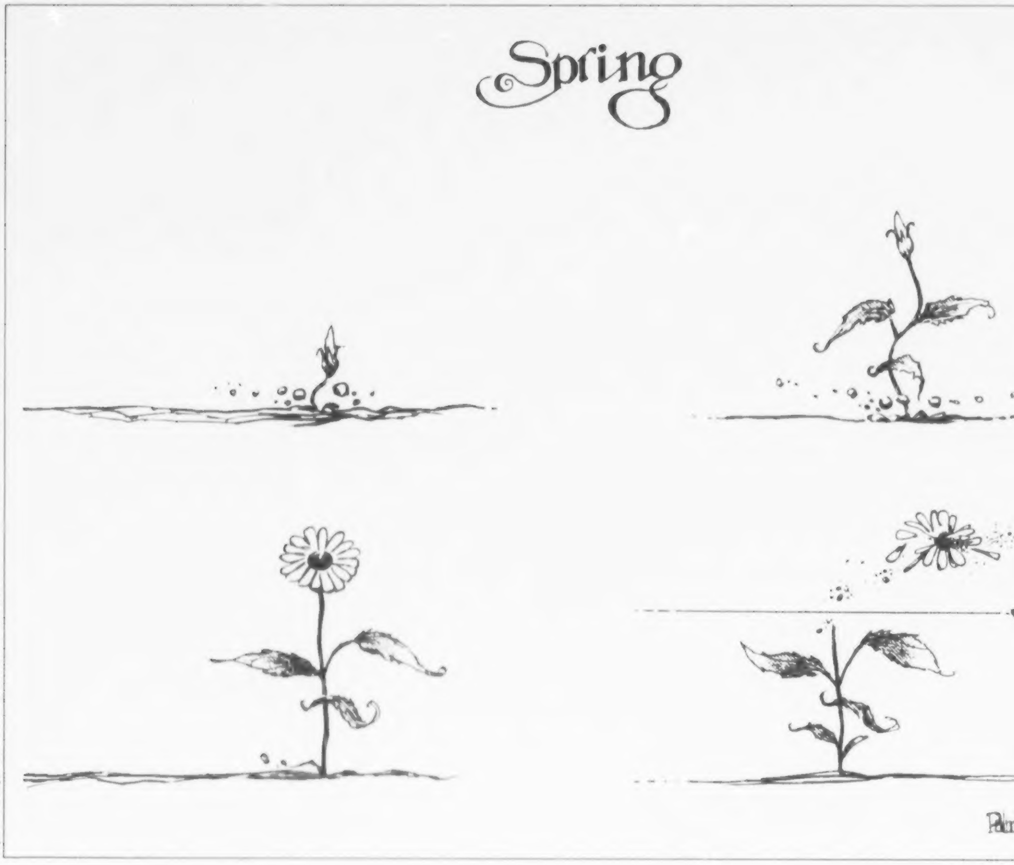
Deterrence is most effective with students who believe the rules are sensible, helpful, and equitably applied; who understand the need for rules; and who agree with the policies. But, according to Bonnie Benard's characteristics, these are the children least likely to be violent in the first place. Deterrence will be least effective and perhaps even counterproductive with the students most likely to bring weapons and drugs into schools, as they will neither agree with the policies nor submit to the rules as sensible or fair.

Establishing deterrence policies and rules will be much more powerful if schools meaningfully involve students in creating them. This process responds favorably to both the research and the democratic principles of involvement in rule making. The students will not only view the rules as more sensible than otherwise, but they will develop an understanding of the need to maintain a balance between Bill of Rights guarantees and the responsibilities citizens need to assume as they construct deterrence policies. As in the case of one Chicago high school student who advocated school metal detectors, they might be willing to abrogate their rights when they become involved in the rule-making process.

Prevention

The remaining measures might help eliminate school violence if they are used with all students *before* any violence occurs. Conflict resolution and peer mediation programs, which are designed to give students the skills to gradually take control of their lives, are the most commonly used method of this type. By giving students alternatives to violence and training them to resolve disputes before they turn violent, these programs appear to be positive responses to the research.

However, it is important to note



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that the cognitive development model, which emphasizes verbalization as in peer mediation, may be much more difficult for students prone to violence. Some educators are searching for ways that offer more physical outlets. It may be more helpful to be able to punch a bag or slam clay into a pot, at least to divert the violence to a nonhuman target.

Mentoring responds to the need for positive, significant relationships with positive role models. But mentoring may not have enough power to counterbalance the impersonal atmosphere of large schools with large classes.

The ability of multicultural sensitivity training to help students form positive bonds may be greatly strengthened by programs that link diverse students over the long term in ways that cause them to work together to problem-solve. Service learning is a powerful model for this purpose. Schools need to have options for students with different learning styles. Understanding why people act as they do, coupled with working together, certainly begins to address violence caused by prejudice.

Parental skill training is designed to tackle what everyone seems to agree is the major cause of violence—dysfunctional families—but, without the ongoing support of a positive community, it won't be effective. At least, learning about parenting can help students understand that there are different parenting models, not just the one they experienced.

When parental skill training also involves students' parents (the grandparents-to-be), they are often overwhelmed by their own problems—unemployment, poor housing, or failed relationships, for example. School systems do not have the resources to address environmental problems or firmly entrenched adult habits. Perhaps the most helpful aspects of these programs are similar to those provided to the students themselves—the parents are able to form a vision of another way of life and some behavior models that can help them reach that vision.

Law-related education has the potential for addressing both the bonding and cognitive development theories. LRE involves putting young people in contact with a variety of positive role models with whom to interact. It also helps develop critical thinking skills—generating and evaluating courses of action. When incorporated into the ongoing curriculum, it also reaches all students.

Treatment

All the "prevention" programs described, if offered only to students who are thought to be most likely violent or who have demonstrated violent behavior, can become treatment programs. Treatment programs have several disadvantages. Many schools find that limited resources call for targeting programs for violence prevention at those most likely to be involved and those who already are. Bystanders to violence rarely are treated because they have not been seen as a critical piece in the puzzle; yet, even if students are not part of the solution to violence, they may be part of the problem. Excluding the majority of a student population from programs because they are neither perpetrators nor victims ignores the research that calls for a strong, positive, antiviolent community.

If not properly administered, targeting students as potential perpetrators or victims can have the additional disadvantage of contributing to self-fulfilling prophecies: if students are so labeled, they are more likely to earn their labels.

Is Further Research Available?

The research that informs schools about effective violence prevention programs is limited and inconclusive. Patrick Tolen and Nancy Guerra at the University of Illinois at Chicago are in the process of completing a review of the literature. Their paper, "What Works in Reducing Adolescent Violence: An Empirical Review of the Field," will be available this spring.

At the University of Michigan, psychologist Leonard Eron's research has identified children who are likely to develop patterns of violence. He has concluded that eight-year-olds who are considered highly aggressive are three times more likely to commit crimes by age 30. Some of the factors he used to identify overly aggressive children include those who disobey the teacher; who often say, "Give me that!"; who push and shove other children; who give dirty looks or stick out their tongues at other children; or who start fights over nothing. As part of his ongoing research, students who score in the top half on the aggression scale are offered three different kinds of treatments. The least expensive intervention is one year of classroom lessons conducted by the regular classroom teacher including all children, not just the aggressive. Another is 22 weeks of small group sessions taught by experts in peaceful conflict resolution. The most expensive treatment, family counseling, also lasts for 22 weeks. In order not to stigmatize the students, those who are selected are sent home with letters indicating they have been selected for "leadership training."

To wait, however, for the results of Eron's or any other research is not an option. What experts and common sense tell us is that no single response can stop school violence. Obviously, schools would be in better shape if society was in better shape; but schools may be the most practical hope of reversing society's violent trends.

The causes of violence are complicated and interrelated. The responses, therefore, must be diverse and varied—tailored to the actual setting in which the violence occurs and the nature of that violence. Every student is at risk. Schools must work now to enhance ways in which they provide students with a safe environment that allows opportunities to bond with nonviolent people as the students develop their cognitive skills.

We cannot afford to wait until society is better.

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Teaching Strategy

No Weapons Allowed

Melissa Lumberg, Hilda Harris, and Charlotte Wager

Background

As in the war on drugs, state legislatures and schools often increase penalties as a response to rising violence. This simple strategy explores a new rule with a harsh penalty that a principal presumably posted after receiving a copy of a new state law designed to keep weapons out of schools.

Students will be asked to consider questions such as: Is the rule clear enough? Will this rule help solve the problem? Can/should it be rewritten? What else can/should principals, teachers, and other school officials do? What can police officers, parents, and students do to help make a school safer?

Objectives

- Students will compare and contrast the "letter" and "intent" of the law by using critical thinking skills in judging the hypotheticals in the student handout.
- Students will recognize that it takes more than a law to solve a problem and that they can play a role in solving problems.
- Students will develop an understanding that state legislators, principals, parents, teachers, police officers, and students may interpret rules differently.

Target Group: Secondary students

Melissa Lumberg, Hilda Harris, and Charlotte Wager are attorneys with the Jenner & Block law firm in Chicago. At James Ward School, they participate in one of the partnerships in the Constitutional Rights Foundation Chicago Constitution Program.

Time Needed: 1 day

Resource Person

The lesson provides a good opportunity to invite your school principal, assistant principal, or a local legislator to visit the class. The guest could react to the students' answers to the debriefing questions. An attorney is also a good resource person for this lesson. The attorney could discuss the process of evaluating a case from all points of view, as do the students who are part of the "human graph" described below.

Materials Needed

- Student handout
- This continuum on the chalkboard:

1	2	3	4	5
Strongly Agree	Tend to Agree	Undecided	Tend to Disagree	Strongly Disagree

Procedures

1. Have the class read the student handout.
2. Choose four or five students to become a human graph, and instruct them to stand in front of the chalkboard. Explain to the class that you will read each hypothetical in the handout and the members of the human graph will react to it by standing in front of the number on the graph that corresponds with their opinion.
3. Instruct the class that the members of the human graph are not allowed to speak, so that the class will have to interpret their thoughts for them.
4. Read each hypothetical. Ask the human graph members, "Do you agree or disagree that this is a violation of the law?" Allow time for human graph members to think about the hypothetical and physically move to a position on the line.
5. Now ask the rest of the class to explain why they feel students are standing under 1. Repeat with 2-5. As human graph members hear arguments that seem persuasive, they may change their minds and move about under the line at any time. You may choose to let the human graph members explain their position after all other students have commented.
6. Continue this process until all the hypotheticals have been evaluated and discussed.
7. To debrief, ask these questions:
   a. Does the school rule need to be changed? Why or why not? If so, how?
   b. Would the teachers, principal, students, parents, and surrounding community of Fairlaw School like your new rule? Why? Why not?
   c. Should consequences for breaking the rule be included? If so, what would be some appropriate consequences? (Possible answers include suspension, expulsion, and punishing the parents).
   d. What are some rules you think schools should have to make them safer?
   e. Who can help make schools safer?
   f. What can they do?
   g. What can you do?

Extension Activity

To improve the rule further, have students in groups of three or four attempt to revise it, including reconsidering punishments. Students may also wish to develop proposals for making schools safer and invite the resource person back to talk about their plans.

Violence Toward Youth, Not Youth Violence

Hon. David E. Ramirez, Judge of Denver Juvenile Court, asks readers to share this perspective on violence and youth. Judge Ramirez served on the American Bar Association Special Committee on Youth Education from 1990-93.

The recent concern over youth violence as expressed by local and national officials exemplifies the ignorance regarding children's issues generally. At the outset, I would note that the real issue is violence toward youth and not youth violence, although those terms are often used interchangeably. Youthful violence assumes youth are violent toward society in general. Violence toward youth implies that youth (children) are the subjects of violence by adults, and other youth. In that regard, it is the violence to youth that has created the current hysteria over youthful violence. Many studies suggest that children who are subjected to violence are more susceptible to becoming violent youth and later violent adults.

A recent survey by the National Institute of Justice indicated that being abused as a child increased the odds of future delinquency and adult criminality overall by 40 percent. The likelihood of arrest as a juvenile increased by 53 percent, as an adult by 38 percent, and as a perpetrator of violent crime by 38 percent if a child was abused and neglected.

It is within that context of violence toward youth that we must direct our energies if youthful violence is to be abated. Ongoing studies and data suggest that incarceration is not a preventative vehicle for future violence. In fact, one recent report indicates that jailing juveniles increased the potential for future criminal acts and jailing juveniles with adults exacerbates their criminality. This would suggest that prevention at age zero is the most appropriate point at which to address juvenile violence.

The irony of this situation is that answers are available and could have been adopted in the past. From scientific studies and common sense, we know why violence involving juveniles exists. The risk factors in the child's life create the cycle of violence. Those risk factors include: (1) family influences; (2) school experiences; (3) neighborhood and community influences; (4) peer influences; (5) individual characteristics.

. . . As a society of committed individuals, we need to deflect the focus from juvenile violence to the juveniles themselves. We need to shift the focus from incarceration to prevention, away from juvenile jails and toward juvenile care facilities. Our leaders must understand the origins of violence, not the results of violence. We must not mistakenly believe that victimization starts at the end of a gun, but when a child is born into deprivation and poverty.

Source: Safeguard News & Views *(Spring 1994): 1-2.* Safeguard News & Views *is published by the Boulder, Colorado, Safeguard Law-Related Education Program.*

Student Handout

The state legislature wants to get tough on crime and help the schools become safer. Increasing school violence has caused it to pass a law saying that, if students bring weapons to school, their parents may be fined and the students may be expelled with possible automatic transfer of their case to adult court, where they could be sentenced to prison for up to two years. Also concerned about student safety, Fairlaw School Board has asked the principal to make sure students understand that they may not bring weapons to school. At all school entrances, the sign "No Weapons Allowed" has been posted. All students found with weapons will be reported to the police.

Try to figure out if the new law should apply in the following cases, keeping in mind both what the sign says, why the legislators passed the law, and what a weapon is.

1. Aaron, a fifth-grade student, takes the city bus to school every day. On the bus, he is sometimes bothered by a group of older boys who take his lunch money and threaten to beat him up if he tells. He is so scared that he begins bringing a short metal pipe to school in his book bag. He plans to pull the pipe out to scare the big boys if they start to hurt him. Is Aaron breaking the rule?
2. Keisha always carries a pocket knife that her dad gave her. She is artistic, and she uses the pocket knife to whittle small wooden statues while she is waiting for the bus going to and from school. Is Keisha breaking the rule?
3. Dejon brings a butter knife to school to use to spread tuna fish on crackers at lunch. Is Dejon breaking the rule?
4. Karen has to walk through a bad neighborhood to get to school. She carries a baseball bat with her every day. Is Karen breaking the rule?
5. Carlos's brother is in a gang. Carlos finds his brother's brass knuckles under the bed. He brings them to school to impress his friends and see if they know what they are. Is Carlos breaking the rule?
6. Jasmine brings a water gun to school and soaks all her friends at recess. Is Jasmine breaking the rule?
7. Andy saves rubber bands, which he likes to shoot at his friends. Is Andy breaking the rule?

Through Students' Eyes: A Fair Classroom

An analysis of students' views on common learning and testing practices

Theresa A. Thorkildsen

Suppose we set out to make issues of fairness central to testing and learning—to organize a classroom that simultaneously establishes equality and recognizes the characteristics that distinguish individual students from one another (e.g., skill, strength, wisdom, kindness, grace). How might we recognize the inherent tensions between the expectations of society and the agendas of particular students?

These are questions that we who are preoccupied with commutative justice ask ourselves. They are also commonly overlooked by educators who seek to establish fair schools. Educators do not ask why we have schools or if students who attend them should be asked to learn, take tests, and participate in contests. It is usually assumed that schools ought to exist and that such common classroom situations are ethical. Educators talk instead about how learning opportunities ought to be distributed, what procedures teachers should use to attain particular goals, and how to punish students who do not do what they are told. That is, educators discuss matters of distributive, procedural, and corrective justice while overlooking commutative justice.

Theresa A. Thorkildsen is an assistant professor of educational psychology at The University of Illinois at Chicago.

Moral Reasoning Assumptions

Psychologist Lawrence Kohlberg argued that most individuals overlook matters of commutative justice because they do not attain the level of moral reasoning that allows them to comprehend such questions. This position is developed in his text with Anne Colby, *The Measurement of Moral Judgment*, among other works. Yet, in the interviews on which Kohlberg's conclusions are based, individuals are never directly asked to respond to questions of how society ought to be organized. Instead, questions focus on personal conduct; for example, people are asked if a husband, Heinz, should steal a drug to save the life of his ailing wife; whether and how Heinz should be punished; and who would be hurt by various actions. People are not asked to critique the ethics of a society wherein someone like Heinz is confronted with such dilemmas.

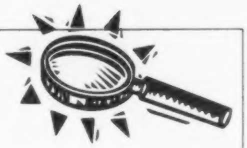
This bias in the exploration of moral development remains, and the development of reasoning about commutative justice continues to be overlooked. It seems problematic, therefore, to assume that, because students appear to accept the fairness of common classroom situations, they cannot reason about commutative justice. Acting on the assumption that students might be capable of such reasoning, I began to study the development of student beliefs on how fair classrooms ought to be organized.

Because there was no research evidence that students could reason about commutative justice, and because we generally take for granted the ideas that schools ought to exist and ought to consist of tests, contests, and learning situations, I started by checking to see if children distinguish among these different types of classroom situations. If so, children should be able to see the different purposes the situations serve and judge the fairness of educational practices in light of this understanding. Adults know, for example, that peer tutoring might be a fair way to help students learn. They usually think it is an unfair way to organize a test or contest because the goals of deciding what each student knows and determining a winner could not be attained.

Fairness and Conflicting Agendas

To define fairness differently for each type of situation is consistent with the views of philosopher Michael Walzer as he explains them in *Spheres of Justice: A Defense of Pluralism and Equali-*

Know These Terms



Commutative justice in the classroom involves balancing society's demands for student equality with individual student perceptions of what is fair in particular situations.

Distributive justice looks at how learning opportunities should be made available to students.

Procedural justice deals with the means teachers should use to attain particular goals.

Corrective justice seeks to determine appropriate punishments for students.

ty. In a fair classroom, he notes, students and teachers should seek to understand and control the different types of situations that predominate in school. They should ask, for example, whether and how often to take tests, practice the things they know, learn new things, and hold contests. Teachers should not seek only to stretch and shrink children to fit into existing molds. Justice, in Walzer's view, is not a matter of regulating personal conduct, but of defining common educational goals and establishing practices that allow individuals to attain those goals. Negotiating fair practices and coming to agreement about how classrooms ought to be organized makes it possible to coordinate issues of equality and of human diversity.

To adopt Walzer's view, we would have to accept that organizing a fair classroom is an inherently conflict-laden enterprise. Within any classroom there will be a multitude of personalities and goals, and it will always be difficult to simultaneously acknowledge this multitude while preserving equality. Dialogue among those in a particular classroom seems an ideal way to respond to this tension. Yet, to fully communicate, teachers and students must examine their understanding of particular educational goals and of particular classroom practices. Communication might be improved, therefore, if we accept the notion of conflicting agendas, note that teachers and students do not often share an understanding of particular goals, and begin to explicitly negotiate fair practices.

A Map of Students' Fairness Reasoning

To anticipate issues that are likely to be conflict-laden, the following results show several levels of students' reasoning about fairness. First, students' ability to distinguish among the particular needs, features, and goals of tests, contests, and learning situations was explored. Then, the extent to which their fairness beliefs reflected an adultlike understanding of each type of situation was studied. I tested whether students incorporated into their fairness beliefs, the range of issues that adults see as relevant when establishing fair testing and learning practices. Finally, the ways in which children prioritize different types of situations was explored.

Conceptions of Fair Testing and Learning Practices

Interviews with elementary students in grades 1, 3, and 5 showed that children as young as first grade easily distinguished among learning, testing, and contest situations and considered their different goals when judging the fairness of particular classroom practices. Specifically, they judged peer tutoring as a fair way to organize learning, but not tests or contests. They judged interpersonal competition as fair only for contests. Solitary work, in their view, was fair for all three kinds of situations, an idea that is compatible with individualistic notions of how a society might be organized.

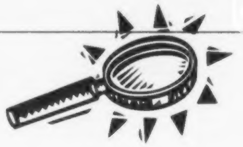
Children were what Walzer would call "particularists"—they recognized that the fairness of a particular practice depends on the definition of the situation under consideration. Nevertheless, the table shows that they did not always hold an adultlike understanding of these situations.

For learning situations, adults are typically concerned about ensuring that all students are able to maximize their potentials. Students ages 6-29 were confronted with this and asked to evaluate the fairness of peer tutoring; enrichment for high-ability students; acceleration for high-ability students; conditions where the high-ability students are required to sit quietly and wait for low-ability students; and conditions where low-ability students are not allowed time to finish assignments.

Most students said that peer tutoring was the most fair way to help students learn. Yet, it was only after about age 18 that students commonly considered the range of issues that adults see as important for learning and argued that fair practices should enable everyone to maximize their intellectual potential. Furthermore, children below about age 10 did not mention learning or understanding when justifying their decisions. They still thought peer tutoring was most fair but talked about making sure that everyone has equal piles of work and rewards.

Whereas learning situations are intended to help students comprehend new ideas, tests are designed to assess what students know. Most adults assume that solitary work is essential if teachers are to discover what each student knows. Interviews with students ages 6-12 showed that they fully understood this only after about age 11.

The development of conceptions of fair testing practices followed a pattern different from that found for learning. Whereas adultlike conceptions of fair learning practices emerged at about age 18, adultlike conceptions of fair testing emerged at about age 11. These findings provide further support for Walzer's belief



A Close Look at Student Viewpoints

Approx. ages	Study A Learning (Thorkildsen 1989)	Study B Testing (Thorkildsen 1991)
6-7 years	*Equality of rewards*: Doing schoolwork and gaining rewards is more important than ensuring that slower workers finish the work. Finishing schoolwork or getting rewards is not associated with understanding or learning.	*Fair practices produce equal test scores:* Peer tutoring is more fair than solitary work because it enables everyone to finish and get the same perfect score.
8-9 years	*Equality in the amount of schoolwork completed:* Practices that allow everyone to have equal piles of work are judged fair. Completing an assignment is not yet associated with learning.	*Fair practices produce equal effort and equal test scores:* Fair practices should permit equal scores. Solitary work is the most fair way to test because teachers can see what students know. Yet, peer tutoring is fair because, by helping slower learners work harder, scores will be equal. Equal test scores mean equal attainment regardless of how they are obtained.
10-11 years		*Fair practices produce equal effort, and unequal test scores are possible:* Helping on tests is unfair because students are harmed if they do not learn to think for themselves and remedy their own mistakes. But, if peer tutoring is allowed, students will know the work equally well.
12-13 years	*Equality of learning:* Learning is the most important social good to be considered. Everyone should learn the same material equally well. Practices that allow this are judged fair.	*Fair practices produce equal representation of abilities:* Fair testing requires solitary work. Peer tutoring is cheating. Different scores for fast and slow learners are seen as fair and possible, even if everyone works hard. Helping will not make everyone equal in ability.
14-16 years		
16-18 years	*Equity and equality of learning are partially differentiated:* Students vacillate between endorsing practices that promote simple equality of learning (as in Level 3) and equity of learning (as in Level 5), wherein abler students learn more.	
18+ years	*Equity of learning:* Judged most fair are meritocratic systems, where those capable of learning more do so.	

that individuals construct an understanding of each type of situation and a corresponding conception of fair societal practices.

Although these generalizations are possible, teachers will probably find that their students are sometimes confused about the meaning of particular situations. Primary teachers, for example, might be surprised to find that children are confused about when copying is legitimate. These youngsters have difficulty distinguishing between copying to learn new words and copying to complete a spelling test. Furthermore, it is difficult for children (and adults) to determine whether workbooks and worksheets should be viewed as tests or as opportunities to learn. (These discoveries are evident in Nicholls and Hazzard's *Education as Adventure: Lessons from the Second Grade*.) It seems likely that additional confusing and ambiguous situations will come up if teachers and students regularly engage in discussions about fairness.

Situation Prioritization

Questions about students' conceptions of fairness involve matters of procedural and distributive justice that educators often consider. Organizing tests so that teachers can find out what students know involves procedural justice. Helping high- and low-ability students learn seems to involve both distributive and procedural justice. So far, in other words, we have not directly explored students' commutative justice reasoning. Yet, we have learned that students and teachers do not always share the same understanding of common classroom activities. For certain moral and intellectual purposes, we should be cautious about assuming that adultlike conceptions are superior conceptions. Discussions of how to prioritize various types of classroom situations—matters of commutative justice—can be illuminating for adults as well as children, but only if teachers allow students to comfortably share their ideas.

Evaluating matters of commutative justice requires students to coordinate a variety of goals and values to determine which types of situations should predominate in school and what type of community to build there. To simply ask students what a fair community ought to look like is to invite a level of abstraction that would be difficult to interpret. How can we ensure at least a rudimentary level of shared meaning or common basis for understanding the alternative visions that are likely to be put forth?

One way is to ask students how often a particular type of situation ought to occur. Such a question offers a level of concreteness from which we can make more abstract generalizations about how school ought to be organized. I tried this, for example, by asking students ages 7-12 how much testing is fair in school. To respond to this question, they needed some understanding of the nature and purpose of testing, but they also asserted their own values and weighed the importance of various types of classroom situations (e.g., learning, free time, tests).

In individual interviews, two groups of students evaluated the fairness of different types and quantities of tests ranging from daily tests to replacing tests with class discussions. The students attended schools with two different teaching philosophies—views that seemed to have some impact on how the students prioritized testing.

MONTESSORI CLASSROOMS

One school was a public Montessori school in which students usually spent their time doing active inquiry. They had no textbooks or workbooks, nor did they complete worksheets. Their only experience with tests were state-mandated standardized achievement tests taken in grades 2, 3, and 5. For the most part, the students received all evaluative feedback either verbally or in the form of written comments. The dominant position among these students was that tests interfere with learning and should be used infrequently, if at all. The students typically chose as most fair one standardized test a year or no tests. Some supported their view by illustrating what students might accomplish in place of doing tests. Others talked about the shortcomings of having too many tests. When choosing no tests as fair, these students were not trying to avoid evaluation. They saw tests as serving only to create a paper trail of their mistakes. As one student put it, "The teacher could just ask them questions. Then if they make mistakes, the teacher could correct them and they won't feel bad. Here [in unit tests] they write their mistakes down and it's hard to forget that you made them . . . . It's hard to fix them." Those who selected one standardized test differed only in that they preferred to keep evaluation private. They worried that students would feel embarrassed in front of their friends if they didn't know the answer in a class discussion.

TRADITIONAL CLASSROOMS

The other schools were traditionally organized neighborhood schools where direct instruction was state mandated and systematically implemented. During specific parts of each school day, all interruptions ceased and children engaged in this ritualized form of learning. Lessons began with a review of previously covered material. Teachers then presented new material, and children engaged in guided practice. Feedback and corrections immediately followed. The cycle was repeated until everyone seemed to master the material. Then, when ready, children engaged in independent practice. These lessons emphasized the attainment of correct answers rather than self-expression. Worksheets and tests were frequently used.

The common position among students in these schools was consistent with the view that testing is learning. They argued that having daily quizzes, biweekly unit tests, and a standardized test at the end of the year is most fair. They gave reasons like, "If they do tests, they are learning what they need to for the next grade." They said the more tests students take, the more they learn. They did not suggest that students should study or prepare for tests. To them, the only students who learn take frequent tests and do their own work.

CONFORMITY, WITH EXCEPTIONS

In each type of school, many of the students interviewed said that the amount and type of testing they experienced was most fair. In the Montessori school, where correct answers were not emphasized, students said that tests interfered with learning. In the traditional schools, where learning activities were organized in a testlike fashion, students said that teachers should give frequent tests. These findings suggest that teachers who engage students in discussion about how school ought to be organized are unlikely to be faced with open rebellion against their current practices.

Nevertheless, within each of these schools, a sizable number of students thought that the current practices were not as fair as other alternatives. Some students in the Montessori school held positions consistent with the dominant view held by those in the traditional schools and vice versa.

Furthermore, some Montessori students joined those in the traditional schools in taking a more balanced position that testing informs learning. These students asserted that having tests frequently, but not daily, would keep them on their toes and help them know what was important to study. They usually chose to have either daily quizzes or unit tests, arguing that one or no tests would not help students discover what they need to learn. They also said that having all the different tests would be too many, and that students would not have time to study.

A small number of students in both types of schools asserted a fourth position: that teachers should not evaluate students and that all testing is unfair. They often worried that tests would be too hard and that students would be punished (e.g., would flunk or have privileges taken away) if they did poorly.

This range of positions suggests that teachers and students could benefit from discussions of how school ought to be organized. Public discussions about the diversity of opinions that are likely in a single classroom could lead students and teachers to a deeper understanding of one another.

Insights from One Classroom

Deeper understanding, however, will probably not eliminate conflict. In classrooms where commutative justice is a central concern, negotiations will be constant. A group of fourth and fifth graders, their teacher Candace Jordan, and I discovered this while trying to improve cooperative learning.

Candace regularly engages her students in democratic decision making about fair and effective ways to organize the classroom. When we began our collaboration, Candace's students, like most researchers who study moral development, assumed that fairness must involve matters of personal conduct—following school rules. Through a variety of activities, we let the students know that we were genuinely interested in their critiques of the practices that lead to such rules. Then, with the students' consent, we changed the ways in which they were allowed to collaborate and asked the children to critique their experiences under both the old and new systems. In doing so, we discovered many problems with the cooperative learning practices established by researchers. Some actually hindered the development of beneficial collaborative relationships.

Assigning students to groups, for example, put excessive restraints on the spontaneous creativity that normally dominated Candace's room. Good ideas could not spread as easily throughout the group because students were less free to approach nongroup members who might otherwise help them. We introduced this practice with the hope that students who were becoming socially isolated could be better integrated into group activities. Yet, in doing so, power struggles became the dominant focus of everyone in the room. We had underestimated the importance of personal skill, friendship, and trust to genuine collaboration.

The children also surprised us by inventing a process for resolving personal conflicts in nonthreatening and more moral ways. Placing a tape recorder in a quiet corner of the room, we provoked them to reflect and discuss the fairness and effectiveness of the ways in which they collaborate. They surprised us by using this style of discourse to raise sensitive issues and resolve personal conflicts. They showed us what Dewey meant when he said:

> Democracy is a way of life controlled by personal faith in personal day-to-day working with others. . . . To take as far as possible every conflict which arises—and they are bound to arise—out of the atmosphere and medium of force, of violence as a means of settlement, into that of discussion of intelligence, is to treat those who disagree—even profoundly—with us as those from whom we may learn, and in so far as friends. (225-26)

Angela and Latoya, for example, were having difficulty collaborating and talked it out into the tape

(continued on page 62)

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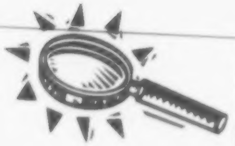
Grade Level ______________

Town and State ____



Which Learning and Testing Practices Are Fair?

As part of your discussion on commutative justice, see how your class completes this anonymous survey. Volunteers can analyze and report the results. Decide whether the findings suggest that your class might benefit from reexamining the ways in which you learn and take tests.

Dr. Thorkildsen is interested in your results! Once you've finished the survey, please take a moment to mail your questionnaires to us along with your analysis. (We will need both!) The deadline is December 31, 1994. If the response is strong, we'll compile the results and publish them in *Update* next year.

Address your package to:

Update Editor
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1. Peer (student) tutoring during learning sessions results in which of the following outcomes? Check one or more.
   - ___ a. increased learning for the person being helped
   - ___ b. increased learning for the person helping
   - ___ c. a and b
   - ___ d. a waste of time for both students
   - ___ e. other ______________________

2. If peer tutoring is allowed *during* a test, whose knowledge will the score reflect? Check one or more.
   - ___ a. the knowledge of the person being helped
   - ___ b. the knowledge of the person helping
   - ___ c. a and b
   - ___ d. no one's knowledge
   - ___ e. other ______________________

3. Check the learning methods you feel are fair for high-ability students. Star the fairest method.
   - ___ a. additional learning activities
   - ___ b. harder learning activities
   - ___ c. the same learning activities as for other students
   - ___ d. shorter time limits for completing activities
   - ___ e. special advanced tutoring
   - ___ f. other ______________________

4. Check the learning methods you feel are fair for all other students. Star the fairest method.
   - ___ a. additional learning activities
   - ___ b. fewer learning activities
   - ___ c. easier learning activities
   - ___ d. longer time limits for completing activities
   - ___ e. peer tutoring
   - ___ f. other ______________________

5. Are tests beneficial to learning? Circle one. Y N If yes, check the kinds of tests that are beneficial. Star the most beneficial kind of test.
   - ___ a. daily quizzes
   - ___ b. weekly tests
   - ___ c. end of unit tests
   - ___ d. standardized tests
   - ___ e. other ______________________

6. Check the testing methods you feel are fair for high-ability students. Star the fairest method.
    ___ a. additional tests
    ___ b. harder tests
    ___ c. the same tests as for other students
    ___ d. shorter time limits for tests
    ___ e. use of books and notes during tests
    ___ f. other ______________________________

7. Check the testing methods you feel are fair for all other students. Star the fairest method.
    ___ a. additional tests
    ___ b. easier tests
    ___ c. the same tests as for high-ability students
    ___ d. longer time limits for tests
    ___ e. tutoring during tests
    ___ f. other ______________________________

8. Do you think we should have schools? Circle one. Y N Why or why not?______________________________

____

9. What should students do in school? ____

____

10. Do learning methods influence test scores? Circle one. Y N If yes, how? ______________________________

____

11. If you could change one learning method, what would it be? ______________________________

____

12. If you could change one testing method, what would it be?______________________________

____

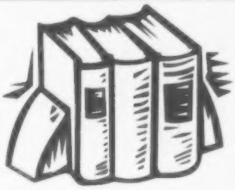
recorder. Angela thought that Latoya had not been doing her share of the work. Here, she challenges Latoya: "[When collaborating], the person has to see that it's OK to work with that person. I usually pick the right people. . . . I picked a new partner [Latoya] now, and she's NOT working very nicely, but I'm getting her good. Before she was not working very good, but I've gotten her on the horsey and now we're taking a ride!"

Latoya responded to this apparent criticism cheerfully, explaining her actions under the pretense of discussing what makes a good collaborator. "If you are stuck on something, and you're working with somebody, the person that knows it may help you with it. Like my friend [Angela]—she helps me with a lot of stuff, and I think it's really nice for her to do that."

"Thank you, Latoya," said Angela with an audible sigh of relief. "I think I have been helping her a lot, too. But, I think the most thing she has been helping me about is being my friend."

In the process of negotiating a fair way to collaborate, these girls came away from a difficult conflict with a deeper understanding of each other. They could not help but resort to complaints about personal conduct. Yet, by discussing what makes a good collaborator, they resolved their differences in a way that was not personally threatening to either. Their subtlety and honesty are impressive; but more important, they worked through their conflict rather than avoiding it by choosing another collaborator. In clarifying their relationship, they established a form of equality—both gained something from collaboration. At the same time, they learned to respect their unique characteristics and to see the limits of their ability to contribute to the task.

In a community of two people, it seems easy to consider commutative justice. How to make commutative-justice discussions a regular feature of classroom life, and to coordinate the multiple perspectives of all students and teachers, is, of course, a far greater challenge. ☐



From Crow Dog to Sacred Clowns: Navajo Mysteries by Tony Hillerman

Gayle Mertz
deana harragarra waters

At first glance, one would not identify Tony Hillerman's Navajo mysteries as law-related education text. Reading any one of his books, however, belies first impressions and reveals all the elements of an engaging LRE lesson.

One thing to be learned about Indians is that history is deeply entrenched in their contemporary lives. Contemporary Indian law is no exception. While the Brule Sioux and Navajo cultures differ, the relationship of tribal to federal law in both cases is built on the same foundation. To illustrate this point, examine the landmark U.S. Supreme Court case *Ex parte Crow Dog*—powerful name, powerful case. On August 5, 1881, Spotted Tail, a Brule Sioux chief, was murdered by Crow Dog, whom he had appointed captain of the Indian police. Following Brule Sioux tribal law, the tribal council ordered an end to the trouble and sent peacemakers to both the Crow Dog and Spotted Tail families. Spotted Tail's and Crow Dog's relatives talked over the damages and agreed that Crow Dog's family should promptly pay Spotted Tail's people $600, eight horses, and one blanket. Thus, Brule Sioux tribal law effectively and speedily redressed Spotted Tail's killing and restored tribal harmony and fellowship.

The story does not end here. Federal officials labeled the Brule Sioux resolution "savage" and the tribe "people without law." Thus, Crow Dog was later tried in the Dakota Territorial Court and sentenced to death by hanging for this crime. His conviction was reversed by the Supreme Court, which held that the Brule Sioux had a sovereign right to their own law, leaving the United States with no jurisdiction. Perhaps this event was the impetus for the eventual passage of the Major Crimes Act of 1885, which expressly provides for federal jurisdiction over major felonies occurring in Indian country.

This case is an example of tribal law's providing a higher measure of justice than American justice did. Brule Sioux tribal law was based on restitution and the importance of continuity of the community as a whole in the furtherance of tradition and custom. Hillerman explores the issues addressed in *Crow Dog*: tribal sovereignty, assimilation, criminal jurisdiction, restitution, reparation, and restorative justice. At the top of the list of issues usually addressed in a murder mystery, but rarely mentioned in any of Tony Hillerman's stories, is punishment.

Opening a Hillerman book, however, is nothing like opening a law book. It is more like opening a combination travel brochure, *National Geographic*, and spine-tingling mystery. The reader is immediately and magically transported to a land that is simultaneously exotic and ordinary; beautiful and harsh; simple and complex. This land is the Navajo Nation. Through the eyes, ears, and hearts of two Navajo tribal police, the reader is introduced to Navajo culture (and, to a lesser degree, those of the Hopi, Zuni, and northern Pueblo).

Each of Hillerman's 12 books finds officer Jim Chee and Lieutenant Joe Leaphorn investigating an unusual death. Their investigations take them beyond a search for material clues and the opportunity to arrest a defendant. Woven as clues into each of these stories are threads of ancient and contemporary Navajo culture. Pulling the wrong thread at the wrong time may expose cultural or spiritual secrets that are meant to be undisturbed. The officers must cautiously determine when and how to unravel the mystery, and when to leave these threads untouched out of respect for cultural taboos.

As the stories unfold, the reader gains a better understanding of what legal scholars refer to as "customary law" in debating *Crow Dog* and subsequent cases. Chee and Leaphorn's knowledge of traditional Navajo marriage, family, and clan relationships, the distribution of property, and social and political organizations assists them in observing Navajo behavior, uncovering and connecting esoteric clues, and explaining their method and reasoning to confused *Belaganas* (Anglos). The patience and respect with which they interact with people, other living creatures, and inanimate objects teach the reader about Navajo relationships with time and the environment, and a new outlook on the meaning of justice.

Hillerman does not stereotype Navajos or characters from other cultures, but introduces a host of individuals who have diverse and complicated relationships with Navajo culture: Chee, the younger officer, aspires to become a *yataalii* (a shaman), a goal that often puts him in philosophical conflict with his employment in law enforcement; Janet Pete, a half-Navajo public defender, grew up in the city and moved to the Navajo Nation as a cultural neophyte; numerous non-Navajo characters exhibit considerable knowledge of the culture, but taboos limit them from becoming too intimate with a culture they were not born into. It is through the experience, or inexperience, of these characters that the reader becomes acquainted with the subtleties of *hozho* (or *horzo*).

Try as Chee may, he is unable to explain *hozho*'s meaning. His best attempts to translate it into English continually bring him back to the English words *harmony* and *beauty*. However, he is not using these words

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Gayle Mertz is director of the Safeguard Law-Related Education Program in Boulder, Colorado. deana harragarra waters is the law librarian for the National Indian Law Library in Boulder.

to describe music or scenery, but perhaps the kind of justice the Brule Sioux accomplished in the Crow Dog incident. In Hillerman's most recent book, *Sacred Clowns*, Chee explains that " . . . we're dealing with justice, just retribution. That's a religious concept, really. We'll say the tribal cop is sort of religious. He honors his people's traditional ways. He has been taught another notion of justice . . . . That way you restore *hozho*." In each of Hillerman's books, Chee and other characters strive to reconcile the incongruity between traditional U.S. justice and traditional Navajo justice: the difference between punishment and restoration. In following Chee's quests, the reader learns that U.S. justice is defined by laws and judges; Navajo justice, by elders and shaman.

Hillerman's fidelity to Navajo culture and religion has won him an honored place in Navajo society. In 1987, he became the only person to receive the "special friend of the *Dineh*" award "for authentically portraying the strength and dignity of traditional Navajo culture." (The Navajo use the word *Dineh* to describe themselves.) His books are widely read by the Navajo and are required reading in many Navajo schools.

Suspenseful mystery, multicultural perspectives, and provocative exploration of law-related issues are intertwined in each of Hillerman's books. His writing skill is equal to the physical beauty of the area that he writes about, and the sensitivity and knowledge that he shares about a people who are often misunderstood. Hillerman paints pictures whereby America can gain a foundation for enriching its legal tradition by observing, respecting, and calling upon the legal traditions of its native peoples, the Indians.

For Teachers and Students:
A Good Book About America's First Woman Lawyer

Myra Bradwell, a 19th-century Chicagoan, was prohibited from practicing law—twice by the Illinois Supreme Court and then by the U.S. Supreme Court. Why? Because she was a woman.

But Bradwell didn't scurry back to her kitchen and her family. Instead, she began a quarter-century career as publisher and editor in chief of the *Chicago Legal News*, for two decades the country's most widely circulated legal publication, and her vehicle for promoting expanded rights for women and legal profession reforms. Bradwell's story is recounted by Jane M. Friedman in *America's First Woman Lawyer: The Biography of Myra Bradwell* (Prometheus Books), published in 1993.

Despite Bradwell's impact on law and women's rights in the mid-1800s, little had been written about her until the publication of this book. In it, Friedman, a law professor at Wayne State University Law School in Detroit, chronicles Bradwell's activities within the Chicago legal community, her advocacy of women seeking to practice law and enter other professions, and the role of the *Chicago Legal News* in improving lawyer's access to information about legislative actions and court decisions.

Bradwell began to study law with her husband James in 1852, when he was a law student himself. She wished to help him in what became his busy practice. She took and passed the bar exam in 1869. The only woman who passed a state bar before her, Arabella Mansfield, passed the Iowa bar six weeks earlier but returned immediately to teaching English and had no further professional involvement with the law.

Bradwell's inability to work increased her motivation to funnel her talents into legal journalism. By 1872, when Illinois passed a law making it possible for women to practice any profession—a law Bradwell drafted and lobbied through the state legislature—"She was so immersed in her new profession that she didn't want to bother [seeking admission to the bar]," says Friedman.

Bradwell's paper became the "paper of record" for the publication of statutes enacted by the Illinois legislature and, later, for printing judicial decisions by the Supreme Court and all the lower federal courts in the country. This tactic was a shrewd business approach that ensured the commercial success of the *Chicago Legal News* and opened the door for Bradwell's use of her publication as a "bully pulpit" for her views.

Through the newspaper and her own actions, Bradwell championed a wide range of causes. She urged better legal education and the establishment of a Chicago bar association (which she was never invited to join). She lobbied against the widespread practice of bribing jurors and exposed the unscrupulous practices of corrupt judges. Many issues she addressed have modern counterparts, such as judges' salaries, courtroom conditions, and oversight of lawyers' misconduct by professional organizations.

Bradwell was a tireless fighter for the rights of women and the mentally ill. She campaigned to open law school admission to women and to allow them to practice, taking up the causes of several women who faced obstacles in their efforts to become lawyers. She was instrumental in obtaining the release of Mary Todd Lincoln, widow of the assassinated president, from a mental asylum where she had been unjustly confined by her son. Bradwell was involved in efforts to permit women to hold public office even before they were enfranchised. And she was active in the suffrage movement, although her contributions were not recorded for history, most likely because of longstanding disagreements with Susan B. Anthony, who as a result left Bradwell out of her accounts of the movement.

To find out more about *America's First Woman Lawyer*, see the April 1994 American Bar Association's *Student Lawyer* (5-6). Or, better yet, see if your local library or bookstore has a copy.

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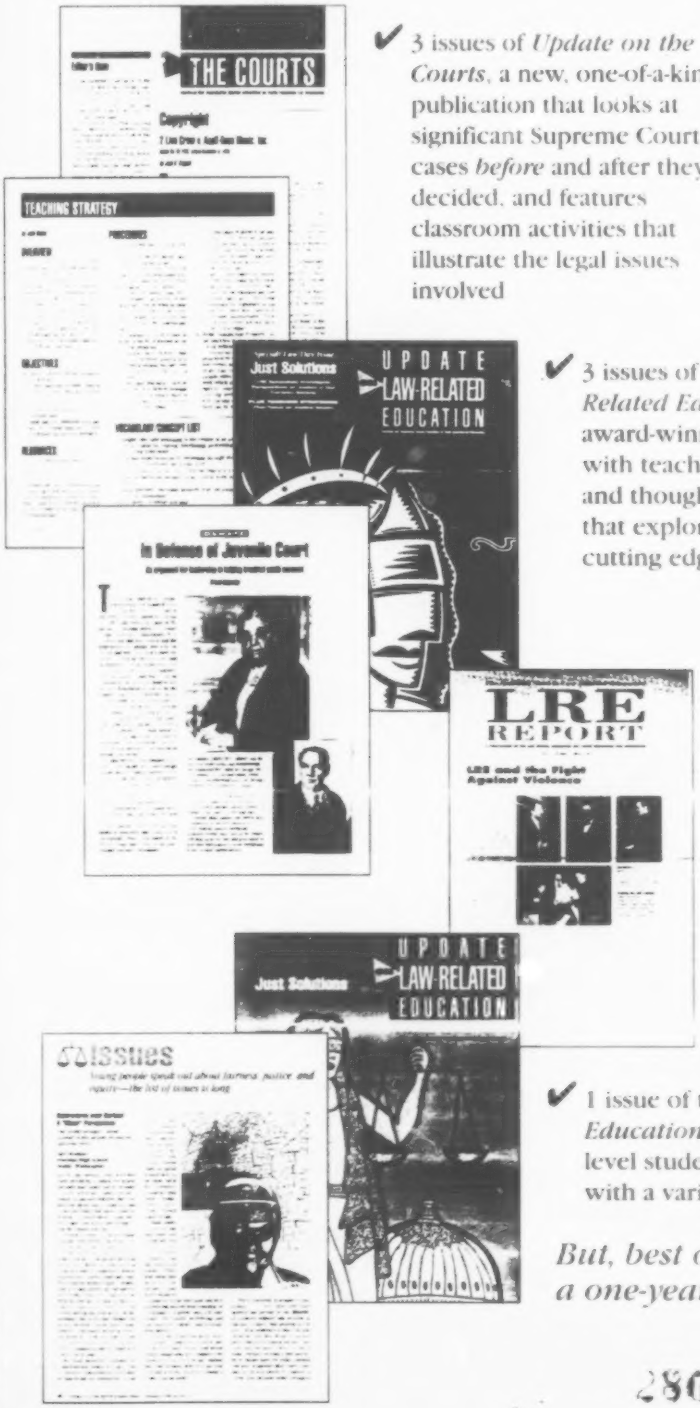

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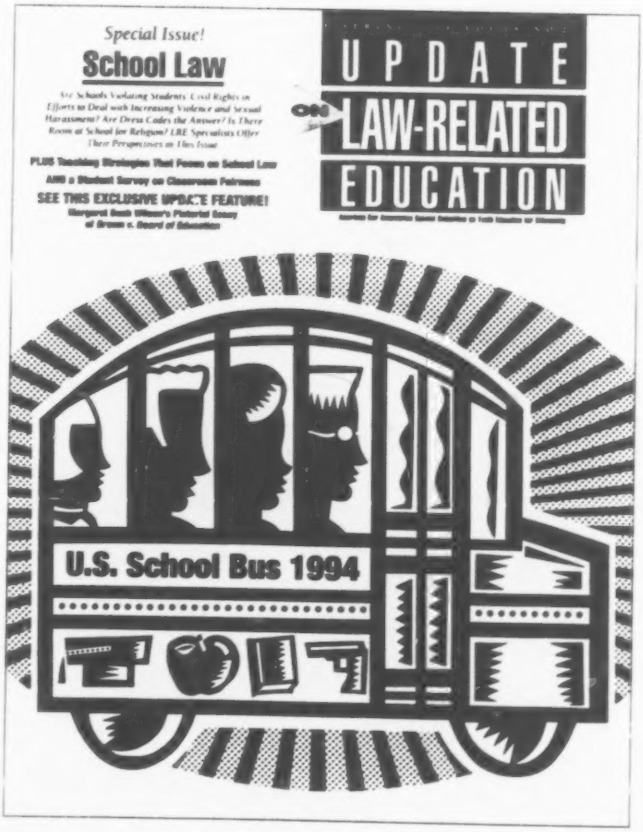

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FALL 1994 / VOL.18 NO.3

UPDATE
LAW-RELATED EDUCATION

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EQUAL JUSTICE UNDER LAW

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Equal Justice Under Law

> *Surely we must [teach] our children about good citizenship. They should know what legal representation of the poor means.... They just should know much more than any of us have ever taken the time to try to teach them.*
>
> Judith S. Kaye
> *Chief Judge, New York Court of Appeals*

Judge Kaye spoke these words at ceremonies in New York in 1994, celebrating over 100 years of legal aid and indigent defense in America. So eloquent in their simplicity, the words find a response in this special issue of *Update on Law-Related Education,* which presents the only instructional guide for teaching students about the status of civil and criminal legal services to the poor. Here, you will find the history, heroes, milestones, and yet-to-be-surmounted obstacles to providing everyone in our country with equal access to justice.

The instructional guide is presented by the Consortium for the National Equal Justice Library, the American Bar Association Standing Committee on Legal and Indigent Defendants (SCLAID), and the Special Committee on Youth Education for Citizenship (YEFC). Originally conceived by Harriet Wilson Ellis, development and collections consultant for the Consortium in Chicago, it becomes available as we are beginning to celebrate the anniversaries of a number of key events that have brought us as close as we are today in realizing the ideal of equal justice.

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Update helps classroom teachers and law-related education program developers educate students about the law and legal issues. The views expressed in this document are those of the authors and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association, the Fund for Justice and Education, or the Special Committee on Youth Education for Citizenship.

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DON'T MISS OUR SPECIAL "LIBERTY, DIVERSITY, AND THE LAW" EDITION SCHEDULED FOR PUBLICATION THIS WINTER!

In 1994-95 come the 30th anniversaries of both the National Defender Project and the creation of the Office of Economic Opportunity (OEO) Legal Services Program, made possible through the ABA's support, led by then-ABA President, U.S. Supreme Court Justice Lewis F. Powell, Jr. The 20th Anniversary of the Legal Services Corporation also takes place, along with the 15th anniversary of the ABA Pro Bono Activation Project. In addition, the 75th anniversary of the ABA Standing Committee on Legal Aid and Indigent Defendants will be observed, having as its first chair Charles Evans Hughes, who later became Chief Justice of the U.S. Supreme Court. In 1996, we will celebrate the 120th anniversary of the establishment of The Legal Aid Society of New York, as our country's first legal aid organization.

The instructional guide also commemorates the upcoming dedication of the National Equal Justice Library scheduled for Law Day, May 1, 1995, at Washington College of Law, The American University in Washington, D.C.

On behalf of the Consortium, SCLAID, and YEFC, I thank all the attorneys, educators, writers, and editors who made this instructional guide possible. Special acknowledgment goes to our subcommittee members, whose guidance was essential to this ground-breaking accomplishment: guest editor Justice Earl Johnson, Jr.; Susan B. Lindenauer; Michael A. Millemann; Robert J. Rhudy; L. Jonathan Ross; Lynn Sterman; and, especially, Harriet Wilson Ellis, without whose inspiration, dedication, and determination, schools would still lack this important teaching tool.

Ironically, most people in the United States today assume that the poor are entitled to free legal services in all criminal and civil cases in which they might be involved. This instructional guide is presented with the hope of replacing that myth for our emerging generation with a clear understanding of how far we have come, and how much farther they can take us in making equal justice for all a reality. Perhaps Bob Rhudy said it best at the very start of our project: "Much is accomplished. Much is to be done." So simple. So eloquent. And so true.

Seva Johnson

Seva Johnson
Editorial Director
Youth Education Publications

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EQUAL JUSTICE UNDER LAW

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Foreword

The Pledge of Allegiance.

You probably have recited the words of the pledge many times, even hundreds of times, in your lives. But have you thought about what it says about the defining political values of our nation? Think about it. The Pledge of Allegiance mentions only two—first, "liberty," and second, "justice for all."

This issue of *Update on Law-Related Education* has more to do with that second ringing phrase, "justice for all," than anything that has ever appeared in this publication—indeed, probably more than anything you have ever read in your lifetime. In these pages, you will learn some disturbing facts, such as that "justice for all" remains more a promise than a reality in contemporary America. But you will also learn of some hopeful progress, particularly in the last 30 years. And you will read some inspiring stories about the everyday heroics of people, most of them lawyers, who spend their lives delivering on this nation's promise, at least for some lucky people.

I have been a judge for a dozen years. If I had any doubts before going on the bench, I can now assure you from personal experience that no one can hope to get justice in America's courts unless they have a lawyer to represent them. I have seen it countless times in the cases appealed to our court. Those without lawyers, and there are many, don't stand a chance. They inevitably lose, even when they may be in the right, because they can't match the knowledge and skills of the lawyers representing the other side. It is no accident that it takes four years of college, three years of law school, and then usually several years' experience before one is ready to prepare and present a case in a courtroom. I often liken unrepresented nonlawyers trying to handle their own legal cases to the unarmed Christians forced to face the lions in a Roman arena.

What this all means, of course, is that there can be no "justice for all" unless there are "lawyers for all." Lawyers, for good reason, are highly educated professionals. Unfortunately, that also means they cost money, too much for poor people and, quite frankly, for many middle-income people as well. The only way to make justice available to millions of Americans is to somehow provide them with the lawyers without which justice is impossible. In practice, that's what it means to deliver on the promise of "justice for all" in modern-day America.

If you are a student from a family of limited means, you may already have experienced how difficult it is to face a serious legal problem without a lawyer. But if you are a student from a family with plenty of money that can afford to hire a lawyer when it needs one, why should you care whether less fortunate families can afford to get justice? I would answer with another question: What sort of country do we want to live in—one in which the honest pledge of allegiance to the flag would say "with justice for some and injustice for the rest" or "justice for those who can afford it and injustice for those who can't"? Or do we want to live in a nation which indeed guarantees justice for all its citizens?

You might ask yourself another question. If you or someone in your family had to go to court without a lawyer and the other side had one, would you feel that was justice, that you had a fair chance of winning? If you wouldn't feel that you had a fair chance, it can't be justice for any of the millions of others who are forced into that situation every year because they lack the money to hire a lawyer. I think each one of us—rich, poor, or middle class—has a stake in making sure our country lives up to its promise of "justice for all" and in supplying the public support required to make that true.

The great American statesman, Daniel Webster, probably said it best, "Justice, sir, is the great interest of man on earth." Ours is a nation dedicated to the pursuit of that great interest. Yet justice cannot exist in a society unless it is available to every one of its citizens. Thus, we have an interest in seeing that each of us receives justice in our nation's legal system.

By 1996 the nation's capital will have a new library and museum dedicated to America's long and ongoing struggle toward equal justice for all citizens. Located at the law school of The American University, it will be called the National Equal Justice Library. The library and museum will display the history of what has gone before and house the information needed to move forward. If you visit Washington, D.C., in 1996 or after, I hope you will take the time to visit the National Equal Justice Library and learn still more about America's continuing pursuit of "equal justice for all."

Justice Earl Johnson, Jr.
California Court of Appeal
President, Consortium for the National Equal Justice Library
Guest Editor

PHOTO: REUTERS/BETTMANN

Equal Justice Edition Subcommittee

Earl Johnson, Jr.
Associate Justice, California Court of Appeal, formerly the Director of the Legal Services Program of the Office of Economic Opportunity (the predecessor of the Legal Services Corporation) and later a Professor of Law at University of Southern California Law Center; author of *Justice and Reform* and co-author of *Toward Equal Justice*, two books about legal representation of the poor; President of the Consortium for the National Equal Justice Library, Inc., and Chair of the "Access to Justice" subcommittee of the ABA Consortium on Legal Services and the Public; "Appellate Justice of the Year" award from the Los Angeles Trial Lawyers Association, first annual "Loren Miller Legal Services" award from California State Bar.

Harriet Wilson Ellis
Development and Collections Consultant for the National Equal Justice Library; first Public Affairs Director for the Legal Services Corporation in Washington, D.C.; former Director of the Office of the President of the American Bar Association; former Vice-President of Programming and Research for In-Court Television (now Court TV); author and video consultant, "Report on the Solo and Small Firm Lawyer in American Society" for the New York State Bar Association Task Force on Solo and Small Firm Practitioners; Project Director of the American Bar Association/American Medical Association Partnership Against Drug and Alcohol Abuse.

Susan B. Lindenauer
Counsel to the Executive Director of The Legal Aid Society of New York; member, New York State Bar Association House of Delegates, and officer, Criminal Justice Section; former chair, Committee on Legal Assistance of the Association of Bar of City of New York and former chair, Committee on Legal Aid of New York State Bar Association; recipient, New York County Lawyers' Association Award for Outstanding Public Service; President, Columbia University Law School Association, member, Columbia University School of Law, Board of Visitors, and cochair, Committee on Public Interest and Pro Bono.

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Jacob A. France Professor of Public Interest Law, Director, Clinical Law Program, and Professor of Constitutional Law at the University of Maryland School of Law in Baltimore; former Chief General Counsel and Chief of the Civil Division, Maryland Office of the Attorney General; former Director of Litigation, Multnomah County Legal Aid Program; various positions, the National Prison Project and The Baltimore Legal Aid Bureau; Reginald Heber Smith Fellow, Georgetown Law Center; recipient, ABA Litigation Section John Minor Wisdom Public Interest Award.

Robert J. Rhudy
Executive Director, Maryland Legal Services Corporation; Chairman, Legal Services to Indigents Committee, Maryland State Bar Association; former President, National Association of IOLTA Programs, Inc., Executive Director, Coalition for Legal Services, Washington, D.C., Chief Attorney, Legal Aid Bureau, Baltimore, and President, Iowa Civil Liberties Union.

L. Jonathan Ross
Trial Lawyer, Wiggin & Nourie, P.A., Manchester, New Hampshire; cofounder, Bar Leaders for the Preservation of Legal Services for the Poor; 1986 recipient, Arthur von Briesen Award, National Legal Aid and Defender Association; member, ABA Standing Committee on Legal Aid and Indigent Defendants; past president, New Hampshire Bar Association and New England Bar Association.

Lynn Sterman
Assistant director of the American Bar Association Division for Legal Services and committee counsel for the Standing Committees on Legal Aid and Indigent Defendants and Lawyers' Public Service Responsibility.

A Salute to the National Equal Justice Library

EQUAL JUSTICE UNDER LAW

The history and significance of the legal aid, indigent defense, and pro bono movements advancing equal justice in America, and a comparison of efforts toward this goal in other countries

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Few times are as exhilarating as when something emerges that is a true first, serving an overlooked, but important purpose. So it is with the new National Equal Justice Library to be located in space donated by Washington College of Law of The American University, Washington, D.C., in its new law school building.

The library will be our country's first national institution to document America's over-a-century-long commitment to advancing equal justice through legal representation of the poor including the legal aid, indigent defense, and pro bono movements.

Despite the struggle to make good on our country's promise of equal justice through these efforts for more than 100 years, little until now has been done to educate the public about these essential initiatives and the people who conceived and carried them out. There have been many from many walks of life: legislators, government officials, jurists, public-policy makers, bar association leaders, legal educators, and numerous other advocates.

But most have been the hundreds of thousands of lawyers who have dedicated—and continue to dedicate—their careers as legal services lawyers representing the poor in civil matters; as defenders providing counsel to indigents in criminal cases; and as private lawyers volunteering countless hours pro bono to both of these pursuits.

They are lawyers who have made a difference. They are from diverse backgrounds, serving clients from diverse backgrounds, the latter with the common link of being economically disadvantaged, underrepresented, and unable to afford access to equal justice.

Through the efforts of these lawyers and the legal aid, indigent defense, and pro bono movements, millions of Americans have been provided access to equal justice that otherwise would have been denied. And through these efforts, landmark cases bringing the ideal of equal justice closer to reality have been won—*Gideon v. Wainwright*, for example, establishing the right to counsel for indigents in state criminal prosecutions. There have been many other landmark cases, both criminal and civil. But much remains to be done.

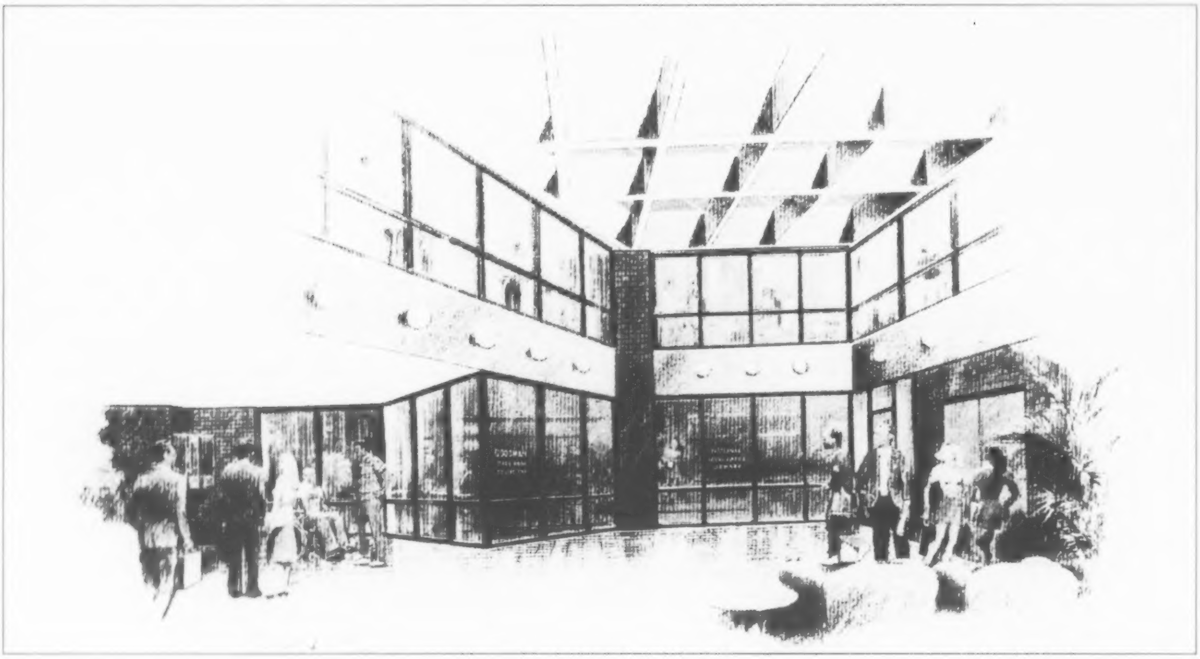
The instructional guide presented in this issue is the first comprehensive presentation for school use detailing this significant, yet basically unrecognized piece of America's history, which will be preserved in the National Equal Justice Library.

The library will be our nation's most comprehensive repository of published and unpublished materials, including oral histories, on the organization, financing, and delivery of legal representation to the poor in civil and criminal matters.

These collections will provide information for building on past experience to help solve current access-to-justice problems and to improve meeting the legal needs of the poor and those of low-income people in the future. By capturing this information, which now exists in scattered locations and is at a high risk of being lost, the library has an overall objective of helping to make the ideal of equal justice a reality.

Each of the library's collections will be accessible nationally and worldwide through telecommunications and computer links, along with a high-tech imaging process. Moreover, collections will trace how other countries deliver legal representation to the poor, which, too, is covered in the following pages.

The National Equal Justice Library evolved through the inspiration and persistence of Guest Editor Justice Earl Johnson, Jr., of the California Court of Appeal. An early and tireless legal services advocate, Justice Johnson was the Director of the Office of Economic



Opportunity Legal Services Program in the 1960s. The library of which Justice Johnson is president is cosponsored by a consortium comprised of the American Bar Association, the National Legal Aid and Defender Association, and the American Association of Law Libraries.

The library's Honorary Co-chairs are former United States Supreme Court Justice William J. Brennan, Jr., former U.S. Senator Warren B. Rudman, and the Honorable Sargent Shriver. Each was selected for courageous leadership and support of the cause symbolized by the National Equal Justice Library, scheduled to be dedicated in the spring of 1995 in Washington, D.C.

The Consortium has a 23-member Board of Directors and a National Development Council with members from around the country. Each member brings distinction for his or her ongoing work and commitment to legal aid, defender, and pro bono programs, representing these communities, as well as academia, library science, and the bench.

On behalf of the board and the National Development Council, we want to thank Mabel McKinney-Browning, Director of the ABA Public Education Division, for her visionary commitment to producing this instructional guide, without which it would not have happened. We also want to thank Seva Johnson, Editorial Director of the ABA Youth Education Publications, and editor of this special *Update* issue, for her talent in making it come alive; and the ABA Standing Committee on Legal Aid and Indigent Defendants and the ABA Special Committee on Youth Education for Citizenship for their valued support.

We further are indebted to everyone working on the production of this guide for their research and writing efforts, expertise, invaluable insights, and time. Those, too, who gave freely of their knowledge and time for interviews are to be thanked, as are the members of the subcommittee, named previously, for their special and rich contributions.

We believe that this instructional guide is a vital first step in creating a better public understanding of the forces at work in America to meet our country's promise of equal justice. Such enhanced awareness, we also believe, helps to reinforce public confidence in our democracy, a model for the world. For this feat, one of the library's primary missions, we are indeed grateful and hope that you find this instructional guide similarly useful.

Harriet W. Ellis

Harriet Wilson Ellis
Development and Collections Consultant for the National Equal Justice Library

EQUAL JUSTICE UNDER LAW

History of Legal Aid in the United States

Making good on our country's promise of equal justice for all

R. James Steiner & Carol J. Holahan

THE NEW YORK LEGAL AID SOCIETY

Background

Today, legal aid is any of several programs that provide legal services to people who cannot afford to hire a lawyer when they are involved in a civil case, either as a plaintiff or a defendant. Some legal aid is funded by government at the local, state, and federal levels. Some is provided by individual lawyers, lawyers' associations, and other organizations.

Legal aid agencies often handle these cases, which can include divorces and child custody cases, property disputes, and job and rent disputes. Yet, at one time people who could not afford a lawyer had no way of resolving such disputes through the judicial system.

1876—When It All Began

The nation's centennial in 1876 welcomed the creation of the German Legal Aid Society in New York City. This society is credited with being the first independent legal services agency to help poor people. It was set up in response to years of mistreatment of poor people, especially immigrants, by employers and landlords.

Attorneys Steiner and Holahan began their trial careers as student advocates for the Suffolk University Hispanic Clinical Program (SUCLINICA) affiliated with Greater Boston Legal Services. Both remain active in providing pro bono legal services support in their community. Attorney Steiner chairs the New Hampshire LRE Board.

In 1880 New York patent attorney Arthur von Briesen became the head of the German Legal Aid Society and expanded the concept of legal aid across the country and throughout Europe. Von Briesen believed that everyone had the right to seek justice through the court system. He saw legal aid not as charity but as a way to provide justice for all. By 1896 the organization had become simply The Legal Aid Society.

The 1900s—Reaching Other Cities

By the turn of the century, a small number of cities besides New York had set up legal aid organizations. These included Chicago and Boston.

The number of cities establishing programs jumped between 1900 and 1920. The University of Denver created a clinical legal program in 1904, which was the first of its kind affiliated with a law school and which became the nucleus of the Denver Legal Aid Society.

By 1917 various bar associations (made up of professional lawyers), private organizations, municipalities, and law schools supported 41 legal aid offices coast to coast.

Any notion that this increase was enough to meet the needs of a growing population of poor families was dashed in the 1919 book *Justice and the Poor* by Boston lawyer Reginald Heber Smith. Funded as a study for the Carnegie Foundation, Smith's book

CHICAGO DAILY LAW BULLETIN

concluded that the poor in America lacked meaningful access to the courts.

The 1920s—National Support and Recognition

Smith's book led the American Bar Association (ABA) in 1920 to develop a formal relationship with existing legal aid programs. Charles Evans Hughes, probably the leading lawyer of his generation, headed the newly created ABA Special Committee on Legal Aid. A year later, Smith became chair of what had evolved into the Standing Committee on Legal Aid.

In 1923 the nation's loosely knit legal aid offices joined forces and formed the National Association of Legal Aid Organizations. Today, the association's successor is known as the National Legal Aid and Defender Association. For the remainder of the 1920s, the money devoted to legal aid more than doubled, and more than 30 new local legal aid organizations joined the national organization.

The 1930s—Effects of National Economic Crisis

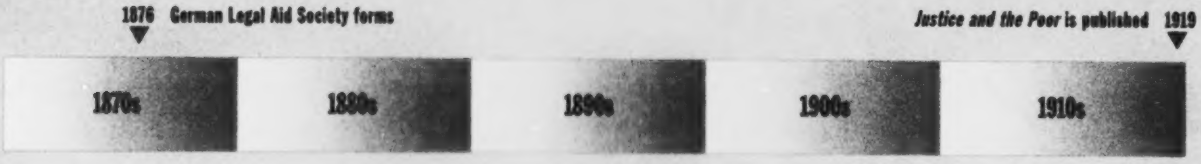
With the Great Depression of the 1930s, the financial support for legal aid disappeared. The Depression, which began in October 1929 and lasted about 10 years, was a prolonged business slump that left millions of Americans penniless.

Legal aid cases increased from 171,000 nationally in 1929 to 331,000 in 1933. Despite this, only 229 of New York's 17,000 lawyers contributed to the Legal Aid Society in 1934. Clients became dissatisfied with the service provided. Demand for legal aid actually dropped during the rest of the 1930s.

Some innovations in legal aid did develop during this rather troubled period in its history. The Philadelphia bar sponsored neighborhood law offices run by attorneys in private practice. The Los Angeles Bar Association started the first lawyer referral service in 1937. This service advised people seeking legal help about competent local lawyers who could help them. Other bars followed suit.

The 1940s and 1950s—Expanding Service and Demand

During the 1940s and 1950s, legal services expanded. Eventually, the percentage of major cities lacking legal aid fell to 21 percent, half the previous level. The real thanks for this initiative rests overseas, as a result of a British movement in legal aid on a national scale. The Legal Aid and Advice Act of 1949 adopted in England provided



1876 German Legal Aid Society forms

Justice and the Poor is published **1919**

THE NEW YORK LEGAL AID SOCIETY

government financing for legal representation of the poor by attorneys in private practice. Fearing a similar movement in the United States, local bars and organizations made sure control remained local by providing enough support to thwart a national program.

Demand, however, continued to outpace the growing supply of legal aid. Legal aid supporters learned a significant lesson during the Depression and subsequent recovery: They could not rely on private, local funding to keep legal services programs alive during an economic crisis.

The 1960s—A Time of Renaissance

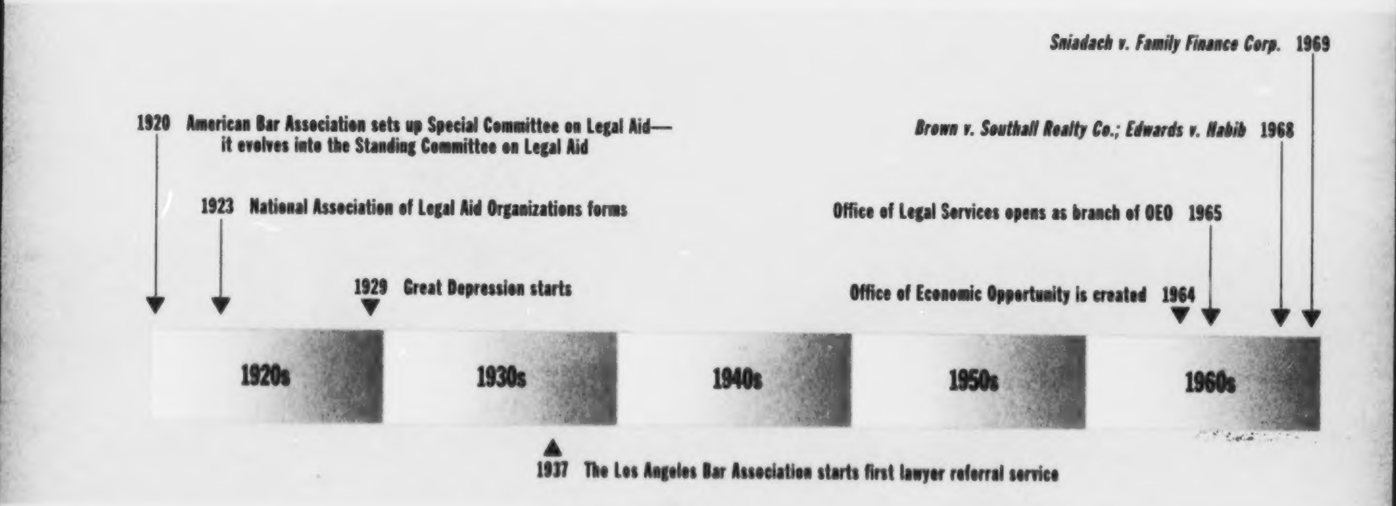
The first federal funding of legal aid services for civil matters was part of the Economic Opportunity Act of 1964. This law created the Office of Economic Opportunity (OEO) as part of the Executive Office of the President. Former vice-presidential candidate Sargent Shriver served as the first director.

That same year, newly elected ABA President and future Supreme Court Justice Lewis Powell made the expansion of legal services a priority during his term in office. Such ABA support for legal services was unprecedented.

In 1965 the Office of Legal Services emerged as a branch of the OEO. The creation of the Office of Legal Services expanded the notion of legal services to the poor as an area of concentration within the legal profession, known as poverty law. Sargent Shriver appointed Clinton Bamberger as the program's first director.

Bamberger came to the program from private practice in Baltimore. What he lacked in experience with legal services he more than made up for in energy. He developed strong national support for legal services for the poor and promoted many policies governing legal aid programs.

Earl Johnson, Jr., the program's first deputy director, succeeded Bamberger in June 1966. Unlike Bamberger, Johnson had been a neighborhood lawyer serving poor people in Washington. The guidance and leadership provided by these first two directors ensured that federally funded legal services programs were built on strong foundations.


1920 American Bar Association sets up Special Committee on Legal Aid—it evolves into the Standing Committee on Legal Aid
1923 National Association of Legal Aid Organizations forms
1929 Great Depression starts
1937 The Los Angeles Bar Association starts first lawyer referral service
1964 Office of Economic Opportunity is created
1965 Office of Legal Services opens as branch of OEO
1968 Brown v. Southall Realty Co.; Edwards v. Habib
1969 Sniadach v. Family Finance Corp.
1920s
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That first year the Office of Legal Services made 130 program grants. Funding surpassed $20 million. In 1968, 260 programs were funded. Legal services covered every state but North Dakota (where the governor vetoed the grants). The Office of Legal Services budget grew to $71.5 million by 1972.

During Johnson's tenure as Legal Services Program director, backup centers received significant attention. These centers developed expertise in specialized areas, such as welfare, housing, Native American issues, or the elderly.

Initial backup centers were housed at law schools and each center focused on a particular topic, such as housing. These schools developed guides for legal aid lawyers on how law on that topic was developing and also assisted local legal services lawyers in important cases. This guidance, in turn, helped legal aid lawyers give their clients the best service.

The Reginald Heber Smith Fellowship Program also developed during this time. This program recruited and trained lawyers in poverty law and placed them in local programs. At one time these "Reggies" comprised 25 percent of the lawyers serving in the nation's legal services program.

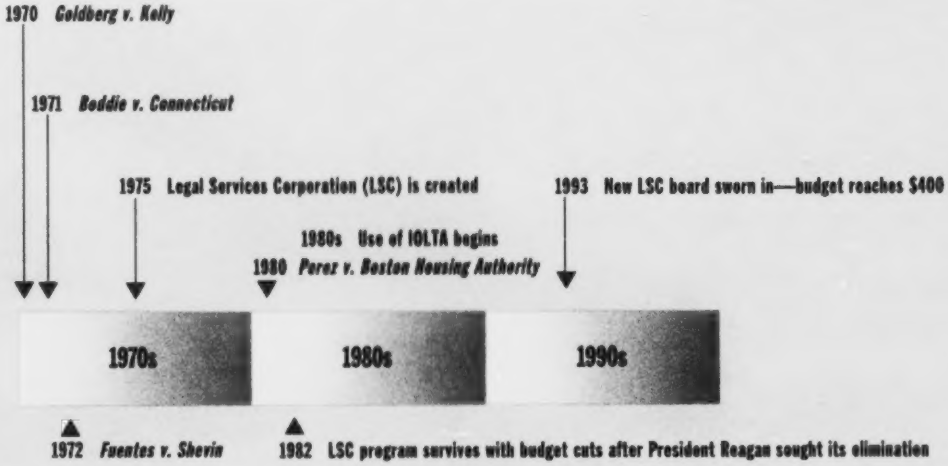
Legal services organizations in the states often face a variety of political challenges. One significant battle concerned an attempt in 1969 by Senator George Murphy of California to amend the Economic Opportunity Act. Murphy sought to block legal services from suing other government programs that broke the law by not complying with legitimate claims on behalf of legal services clients. The attempt failed, but the issue lives on. In June 1994, propriety of legal aid suing state agencies was being discussed in New Hampshire newspapers, for example.

The fear that political pressure could erode the legal services programs led supporters to consider an alternative form of organization that could be shielded from politics.

The 1970s—Ups and Downs of the Legal Services Corporation

Political pressure notwithstanding, by 1973 the Office of Legal Services had

UPI/BETTMANN NEWSPHOTOS


1970 Goldberg v. Kelly
1971 Boddie v. Connecticut
1975 Legal Services Corporation (LSC) is created
1993 New LSC board sworn in—budget reaches $400 million
1980s Use of IOLTA begins
1980 Perez v. Boston Housing Authority
1970s
1980s
1990s
1972 Fuentes v. Shevin
1982 LSC program survives with budget cuts after President Reagan sought its elimination

more than 2,600 lawyers working in over 900 law offices and involved in over 250 community-based agencies.

After three years of legislative battles, compromise and negotiation finally led Congress to close the Office of Legal Services and transfer its functions to the new Legal Services Corporation (LSC) in 1975. This nonprofit organization is an independent voice supporting legal representation for people unable to afford private counsel.

LSC is governed by an 11-member board appointed by the President and confirmed by the U.S. Senate. The corporation receives an annual appropriation from Congress for its operations and for grants to local organizations providing legal services.

The act that created the LSC restricted its activities in various ways. Of the 11 board members, only 6 can belong to the same political party. The type of cases pursued and the activities of participating attorneys are also restricted somewhat.

Amendments in 1977 liberalized many of the original restrictions imposed on the LSC. The amendments allowed attorneys to provide advice in school desegregation cases, although they could not represent clients in such cases. Previous restrictions on representing people claiming incorrect classification under the Military Selective Service Act were eliminated. Meetings of the Legal Services Corporation and its state advisory councils were required to be open meetings.

The LSC sought to meet a "minimum level of access." Its goal was to have two attorneys for every 10,000 clients. Growth over the next three years allowed legal services to meet the minimum access goal by 1980.

The 1980s—Fighting to Survive

The LSC met its peak budget of $321 million in 1981. That year LSC-funded programs employed 6,000 staff lawyers working in local legal services programs reaching virtually every county in the nation.

The next year and a new presidential administration brought severe budget cuts. LSC survived an attempt by President Reagan to eliminate the program, but not without a 25 percent budget cut. Subsequent increases were small so that funding by 1988, adjusted for inflation, was approximately 50 percent that of 1981.

Creative thinking led to the use of Interest on Lawyers' Trust Accounts (IOLTA) as a non-Legal Services Corporation method to subsidize legal services in the states. The concept is simple. Law firms hold a variety of funds in trust that cannot earn interest for their clients. During the 1980s, most states passed laws or court rules pooling those trust accounts and using the interest to fund civil legal services and other worthwhile justice programs.

Voluntary or *pro bono* (from Latin, for the public good) services by private attorneys also expanded greatly during the 1980s, with nearly 150,000 attorneys taking cases each year without charge. In the end, it was the private bar and other organizations that once again filled some of the gap in legal services available to the poor.

The 1990s—Continuing Service

In 1991–92, the National Legal Aid and Defender Association listed 2,369 main and branch offices in the United States and territories that provided civil legal assistance to people unable to affo~~rd~~ private counsel.

These offices include about 4,800 attorneys and 2,000 paralegals supported by LSC today. To this list must be added an additional 130,000 private attorneys who take some pro bono or reduced-fee cases.

Legal services has proven to be a wonderful training ground for lawyers, too. It provides them with a quick entry into litigation and the experience of working with clients. We know. We tried our first cases in Chelsea District Court outside Boston, on behalf of tenants as part of the Suffolk University Hispanic Clinical Program (SUCLINICA). This program is affiliated with the Greater Boston Legal Services, the successor to the original Boston Legal Aid Society of 1900. ◆

I recognize there have been periods when the federal legal services program has been controversial. Much of the criticism has been unjustified. When migrant workers and other poor individuals assert their legal rights, they can offend powerful interests in society. That does not mean there is something wrong with the program; it means that it is doing its job.

Warren Rudman
Former U.S. Senator whose strong leadership in Congress allowed the survival of federally supported legal services in the 1980s

Heroes of Legal Aid

Many people have worked to make the promise of "justice for all" in our Pledge of Allegiance a reality. Here are some whose contributions were particularly noteworthy.

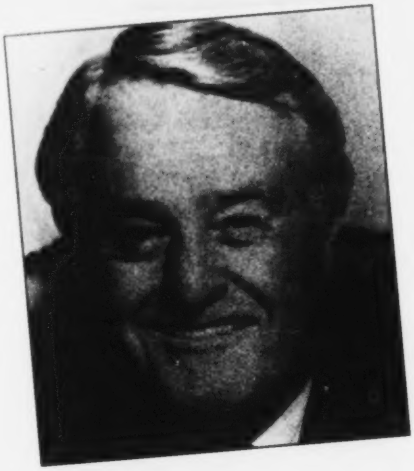
- **Arthur von Briesen** assumed the presidency of the German Legal Aid Society in New York in 1880. He was responsible for expanding legal aid throughout the United States and Europe in the late nineteenth century.

- **Reginald Heber Smith,** who started as a legal aid lawyer in Boston and later was a partner in a large law firm, published a book called *Justice and the Poor* in 1919. This book was the first definitive examination of the unfair administration of justice and its effect on the poor. ▶

- **Charles Evans Hughes,** who had been a presidential candidate and later served as Chief Justice of the United States, headed the newly created American Bar Association (ABA) Special Committee on Legal Aid in 1920.

- **Harrison Tweed** served as the president of the New York Legal Aid Society and was a national leader of legal aid during the 1940s and 1950s.

- **Sargent Shriver** was the first director of the Office of Economic Opportunity (OEO), created in 1964 within the Executive Office of the President. Shriver envisioned a federally funded organization of lawyers representing the poor. As a result, the OEO Office of Legal Services was created. ▶

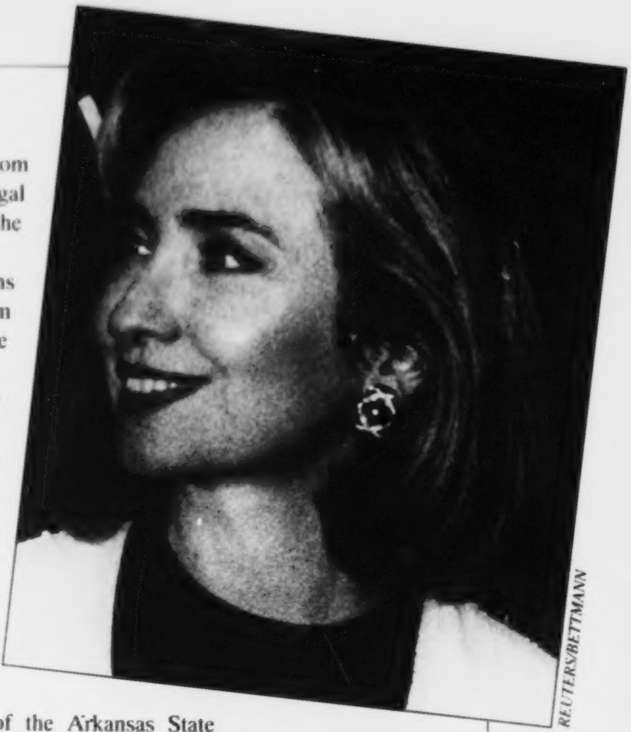


- **Lewis F. Powell, Jr.,** president of the ABA in the mid-1960s, made the availability of legal counsel for poor people a priority and was instrumental in leading support of the ABA and the organized bar for federal funding of legal aid.

- **Clinton Bamberger,** a Baltimore attorney, became the first director of the Office of Legal Services in 1965.

- **F. Wm. McCalpin** as chair of the ABA Select Committee on the Availability of Legal Services in the mid-1960s mustered ABA support for the Office of Legal Services. He later chaired the board of directors of the Legal Services Corporation (LSC), which replaced the Office of Legal Services. Over 10 years later President Clinton appointed him to a new term on the LSC board.

Hillary Rodham Clinton: Defender of Legal Aid



First Lady Hillary Rodham Clinton received a law degree from Yale University in 1973. She has worked to strengthen legal aid during her entire career, starting as a student intern at the Hartford Legal Services program.

That experience "gave me a real insight into the problems of the low income [people] and the way the legal system actually worked as opposed to what I was being told in the classroom," she said.

After graduation, Rodham Clinton became an attorney with the Children's Defense Fund in Washington, D.C. In January 1974, she joined the Nixon impeachment inquiry staff for the House of Representatives' Judiciary Committee.

Later in 1974, Rodham Clinton moved to Arkansas where she taught at the University of Arkansas School of Law in Fayetteville and founded the Ozark Legal Services program. This program gradually won the acceptance of the Arkansas Bar Association and other lawyers' groups.

The following year, Rodham Clinton became part of the Arkansas State Advisory Committee for the Legal Services Corporation. At that time most of the state had no legal services program, so she concentrated on expanding such services.

President Carter appointed her to the board of the Legal Services Corporation (LSC) in 1977. She chaired the board from 1978 until 1981. While she was leader of the LSC, its funding rose from $125 million to $321 million. During this time, legal aid became available in every congressional district of the United States.

Today, Rodham Clinton remains a firm supporter of legal services and hopes to see them grow. "The demand for legal services is so much greater given the economic pressures in our society," she said.

- **Edgar and Jean Cahn** were early advocates of a federally funded legal services program for civil matters. In 1964 they wrote a seminal article in the *Yale Law Review* called "The War on Poverty, a Civilian Perspective."

- **William Steiger** and **Walter Mondale** were legislators who cosponsored the bipartisan bill that created the Legal Services Corporation Act. Steiger, a Republican Congressman, and Mondale, a Democratic Senator, shared a commitment to the goal of equal justice for all. They overlooked political differences and joined in a common enterprise to pass this essential legislation.

- **Wm. Reece Smith, Jr.,** as president of the Florida bar in 1972, was instrumental in creating Florida Legal Service, Inc., the first statewide legal services program in Florida. As ABA president from 1980 to 1981, he led a march of bar leaders on Washington, D.C., to fight the elimination of the Legal Services Corporation proposed by President Reagan. He initiated the ABA's leadership activities to expand pro bono services throughout the United States.

- **Arthur England,** former chief justice of the Florida Supreme Court, led efforts to allow funds held in trust by law firms to earn interest. This interest in turn could be used to fund civil legal services for the poor. He won approval for the Interest on Lawyers' Trust Accounts (IOLTA) program in Florida in 1981. He then worked to expand it nationwide. As a result, more than $700 million have been generated for civil legal services to the poor since 1981. ◆

Benchmark Civil Cases

The following cases, won through the legal services movement, were significant in enabling poor people to obtain justice through our court system.

Landlord/Tenant Issues

Tenants in city slums and poor rural areas often live in unacceptable conditions, such as homes that seriously violate safety codes. Historically, courts considered a tenant's obligation to pay rent to be independent from the landlord's duty to correct defects. So they told tenants they had to pay their rent even though their apartments were unsafe and unhealthy. If they didn't, they were evicted no matter how bad their apartments were. Thus, tenants were often powerless to remedy safety violations, and those who tried feared reprisal from their landlords. A number of cases, however, armed tenants with the force of the law to improve their situations.

Brown v. Southall Realty Co., 237 A.2d 834 (D.C. App. 1968). The court considered whether a landlord was legally justified in evicting a tenant who withheld rent because the premises were uninhabitable. The court held that by leasing the premises with defects, the landlord violated housing regulations, and thus the lease was an illegal contract. The court determined that the tenant had no obligation to pay rent until the landlord corrected the defects.

Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968). The court considered whether a tenant—faced with eviction after complaining to authorities about the condition of the premises—could offer evidence that the landlord was retaliating for the complaint. The trial judge refused to allow the evidence relating to the landlord's motive, but the U.S. Court of Appeals reversed that decision. The court ordered a new trial at which proof of the landlord's motive would be a valid defense to the eviction.

Perez v. Boston Housing Authority, 400 N.E.2d 1231 (Mass. 1980). Tenants brought a class-action suit against the local housing authority for failing to follow court orders and a negotiated consent decree to provide decent, safe, and sanitary housing.

The court considered how to remedy the situation when a local housing authority refused, after many opportunities, to correct wholesale violations of the state sanitary code. The Housing Court appointed a receiver to take over the duties of the housing authority's board. That decision was upheld by the Massachusetts Supreme Court.

Due-Process Rights

Due process is a basic principle of American law. It requires the government to deal fairly with people who are accused of wrongdoing. The right to due process is protected by the Constitution. These cases have helped make that right a reality.

Goldberg v. Kelly, 397 U.S. 254 (1970). In a class-action suit, the plaintiff claimed New York violated the Constitution when it ended welfare benefits without first holding a hearing. The Supreme Court held that welfare is a right for those who qualify, so ending benefits without giving recipients the opportunity to be heard violated due process. The Court set requirements for a constitutional hearing, including the right to present evidence and cross-examine witnesses before an impartial decision maker.

Boddie v. Connecticut, 401 U.S. 371 (1971). The Court considered the constitutionality of a state's $60 fee for using the divorce court. The Court struck down the fee. It determined that due process required a meaningful opportunity to be heard.

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). The Court held that a state statute allowing wages to be garnished without prior notice to the debtor deprived the debtor of property without due process of law. Therefore, it violated the Fourteenth Amendment of the Constitution.

Fuentes v. Shevin, 407 U.S. 67 (1972). The Court found that a state statute allowing the sheriff to repossess property, without prior notice or hearing, when somebody failed to pay a debt deprived that person of property without due process of law. ◆

Vocabulary

class-action suit: a lawsuit brought on behalf of all to whom the case applies

consent decree: an agreement reached with the consent of the involved parties

garnished wages: money legally withheld from a paycheck by an employer as payment of the employee's debt to another party

plaintiff: person or group who files a lawsuit

Teaching Strategy

Students Take Charge

R. James Steiner & Carol J. Holahan

In this activity, students become decision makers. They are asked to decide how to make the American legal system available to all. They must determine how the system can provide legal aid to address civil law cases for all people in need.

Background

In the United States today, legal aid programs provide free legal services to poor people involved in civil law procedures. However, services and funding for them are limited. The programs must set priorities for meeting the most pressing needs. As a result, people who need help are often not given legal representation or equal justice.

Objectives

Students will have the opportunity to
- discuss the role of legal aid in administering justice
- consider ways in which all people—including poor people—can best be provided legal services for civil law cases

Target Group: Junior high and high school students

Time Needed: The activity can be tailored for a 60–90-minute presentation or expanded into a half- or full-day seminar. For a 60–90-minute session, the emphasis should be placed on understanding civil legal aid programs.

Materials Needed: Student Handout "Examining the Future of Legal Aid Programs"

Procedures

1. Since this activity provides an excellent opportunity to use a resource person, contact your local bar organization or legal aid program. Most communities have some type of legal services program and staff. Ask for a staff lawyer to visit your classroom to discuss his or her responsibilities in the community. Such a discussion will help your students focus on key issues being addressed by the local legal aid programs. Introduce the resource person and explain that he or she will be available for consultation throughout the activity.
2. Have the students review the articles in this issue discussing the history of civil legal services in the United States and any other resources addressing civil legal aid programs that you have available.
3. Make and distribute copies of the Student Handout. Then divide the class into groups of 5–8 students. Have each group choose a student who will present the plan developed by the group to the class. Explain that each group is responsible for devising a civil legal aid program that will best meet the needs of all people, not just those who can afford private legal representation. Explain that there is no right or wrong answer to this issue and that students should feel free to devise any type of program they wish.
4. Suggest that students address these questions during their brainstorming and discussion periods.
   - What priorities will you establish and why?
   - What type of organization do you think will best support legal aid programs? Will the organization be a national, statewide, or local program of legal assistance?
   - Who will be entitled to civil legal aid and why? What will be the financial and other criteria used to determine how services will be provided?
   - Will legal aid be offered to cover a vast variety of civil legal issues or limited to a number of selected issues? Will civil legal services groups be permitted to bring suits against public entities?
   - How will the program be funded? Should funding be coordinated at the national level; the local level through bar associations, law schools, or community groups; or a combination? Should funding be increased if population trends indicate a rise in the number of families living below the poverty level?
5. Have each group present its program to the class. Have the resource person conclude the session by summarizing the activity.

To the Resource Person

At the beginning of the activity, provide a brief synopsis of the services provided by the local legal aid program(s) and identify the strengths and weaknesses of the system. As students develop their plans in their discussion groups, you will serve as a roving consultant. In this role, you should provide any information students request and answer student questions. After students present their programs, you may wish to conclude the session by summarizing the activity and identifying the direction in which you see legal services developing in the future.

Student Handout

Examining the Future of Legal Aid Programs

The year is 2014. You are among a small group of experienced lawyers asked to chart the course of civil legal aid programs. You have been given absolute authority to discard existing programs, revise existing programs, or develop new programs.

You control both the funding and the decision-making process for legal aid programs. What would you determine are the priority civil legal programs needed to aid those who would otherwise be unable to afford legal services? Would you discard the present system and create something different? Would you maintain some national centralized control over legal aid, or would you place responsibility solely in local hands? Would you put money into a publicly funded local program, or would you use limited funding to encourage private firms to provide pro bono services? Would you be all things to all people, taking on all legal issues, or would you fund representation for only a limited number of selected issues? Would you make legal representation a guaranteed right for all poor people? How about the middle class? Would you require lawyers to provide representation to poor people without being paid for those services so they would be allowed to charge for their services only those who can afford to pay? The choice is yours.

Explain your program in the space provided. If you need more space, use the back of this handout and additional sheets of paper.

EQUAL JUSTICE UNDER LAW

History of Indigent Defense in the United States

How a constitutional right slowly became a reality for many poor people accused of crimes

Judy Norris

Background

The process of providing justice to people accused of a crime has evolved slowly through the centuries. Only within the last few decades has the idea of equal justice for the poor gained ground in law, if not always in practice.

Criminal law is a branch of law that covers actions believed to harm society. Today in the United States, everyone who is accused of breaking a criminal law and, as a result, could be sent to prison is guaranteed the help of an attorney even if she or he cannot pay for one.

This article examines how lawsuits challenging the way our legal system worked led the U.S. Supreme Court to examine the Fifth, Sixth, and Fourteenth amendments to the U.S. Constitution. The Constitution is a document that describes America's fundamental laws and the rights of its citizens. Amendments are additions to the Constitution, which generally protect individual liberties.

The Supreme Court's interpretations of these amendments resulted in a guarantee that the government would pay a lawyer to defend poor people, or indigents, accused of a crime. This article will examine two methods of providing such legal services and discuss the difficulty of providing good and effective representation for criminal defendants who have little money.

Trials of Long Ago

Throughout history, societies have used many different methods to decide whether those accused of wrongdoing were guilty or innocent. In ancient Greece and Babylon, trial by ordeal was a no-win situation. In the Greek water ordeal, for example, the accused was tossed into water. If the person sank, that was a sign of innocence. Those who rose to the top were declared guilty and put to death.

The ancient Greeks were the first to use jurors, who relied only on written evidence to find the accused guilty or innocent. The ancient Romans began the use of lawyers to advise clients and plead their cases in the courtroom.

In the twelfth century, England's King Henry II extended the king's rules to govern everyone in England. Called the Common Law, these rules made trials uniform; all those found guilty of a particular crime were given the same sentence. Juries were used. A judge played the role of umpire while two individuals told their versions of what took place.

This method of trial, the adversarial method, today is used in the United States. In the adversarial method, the person who best presents his or her case wins. Lawyers help people deal with the complicated procedures and terms of trials and defend their rights.

The Right to Counsel

In 1791 the states ratified the Bill of Rights, the first 10 amendments to the U.S. Constitution. The amendments were aimed at protecting the individual citizen from a powerful federal government. The right of accused people to have a lawyer defend them in all criminal cases comes from the Sixth Amendment.

A person who believes she or he has been wrongly convicted of a crime can appeal the decision. The person can ask a higher court to look at the records of the trial and decide whether the outcome was fair. The higher court's decision creates a precedent, or an example for other courts to follow when similar questions arise.

Law that is passed by legislators, such as members of Congress, is called statutory law. Case law—law decided by courts—is just as important as statutory law, because it tells people how written laws will be interpreted and enforced.

The right to have a lawyer in felony, or more serious, cases was gained through the appeal of a guilty verdict. In *Powell v. Alabama*, 287 U.S. 45 (1932), the Court overturned the conviction of several poor African-American youths because their convictions violated due process. The term *due process* comes from the Fifth Amendment. It means that people must receive fair treatment before being deprived of "life, liberty, or property."

Judy Norris is a graduate assistant in the legal studies program at Sangamon State University in Springfield, Illinois.

The youths had been sentenced to die. The Court said their convictions without legal representation were very unfair. This ruling created a right to have legal counsel appointed, but only under special circumstances, such as when the defendant could receive the death penalty.

Ten years later, the Supreme Court wrestled with the idea of *when* a defense lawyer must be assigned in *Betts v. Brady*, 316 U.S. 455 (1942). The Court ruled that the lack of a lawyer violates due process only if a criminal case is unusually complicated or if the defendant is particularly unable to defend himself or herself.

The Fourteenth Amendment

To understand the controversy of when the right to legal counsel exists and when it does not, we must look at the Fourteenth Amendment. It states, "...nor shall any state deprive any person of life, liberty, or property, without due process of law."

In the *Betts* ruling, the Court said that the Sixth Amendment right to legal counsel was not binding on state courts. People on trial were automatically guaranteed legal assistance only in the federal courts and only if they faced felony charges. At the state level, a defense lawyer had to be appointed

Vocabulary

The *Bill of Rights* consists of the first 10 amendments to the U.S. Constitution providing for individual rights, freedoms, and protections.

A *crime* is wrongdoing that is forbidden by law.

Due-process rights are fundamental rights that require the government to treat people with fairness and justice.

The *Fifth Amendment* protects a person's right to remain silent during any stage of a criminal proceeding, from initial questioning through the trial. This amendment states that no one will be deprived of life, liberty, or property without due process.

The *Fourteenth Amendment* extends the constitutional rights and privileges of citizens dealing with federal authority, such as courts, to citizens dealing with state authority.

An *indigent defendant* is a person charged with a criminal offense who lacks the funds or ability to hire a defense lawyer.

Indigent defender methods include three types: (1) assigned counsel, in which the judge assigns a local lawyer who is paid for the work; (2) public defender systems, in which salaried full- or part-time attorneys are paid by the state to defend indigent people; and (3) contract defense systems, in which a private attorney or law firm bids annually for a contract to represent indigent people.

A *jury* is a certain number of people selected from a particular district, sworn to inquire of certain matters of fact and to declare the truth upon evidence brought before them.

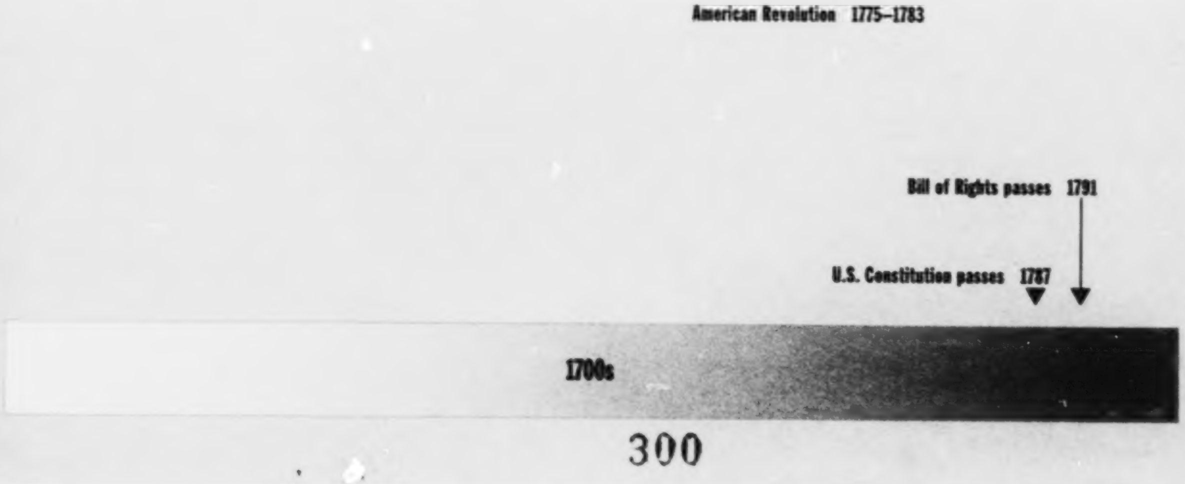
A plea bargain is the process by which the accused and the prosecutor in a criminal case settle the case to their mutual satisfaction, subject to approval by the judge. It usually involves the defendant pleading guilty to a lesser offense, or to only one or some of the charges, in return for a lighter sentence.

Pro bono describes legal services performed by a lawyer who is not paid to provide these services.

A *public defender* is an attorney employed by a government agency who works mainly to defend indigent people accused of criminal offenses.

The *Sixth Amendment* gives people the right to have a lawyer in all criminal cases.

The *U.S. Constitution* describes the nation's fundamental laws and the rights of its citizens.


American Revolution 1775–1783
Bill of Rights passes 1791
U.S. Constitution passes 1787
1700s
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only when a trial's outcome was extremely unfair.

Two Supreme Court justices dissented, or argued against, the *Betts* ruling. They said it created a double standard; defendants in federal courts received greater constitutional protection than those in state courts. Twenty years later, the Court agreed with this argument and the Court reversed the *Betts* decision.

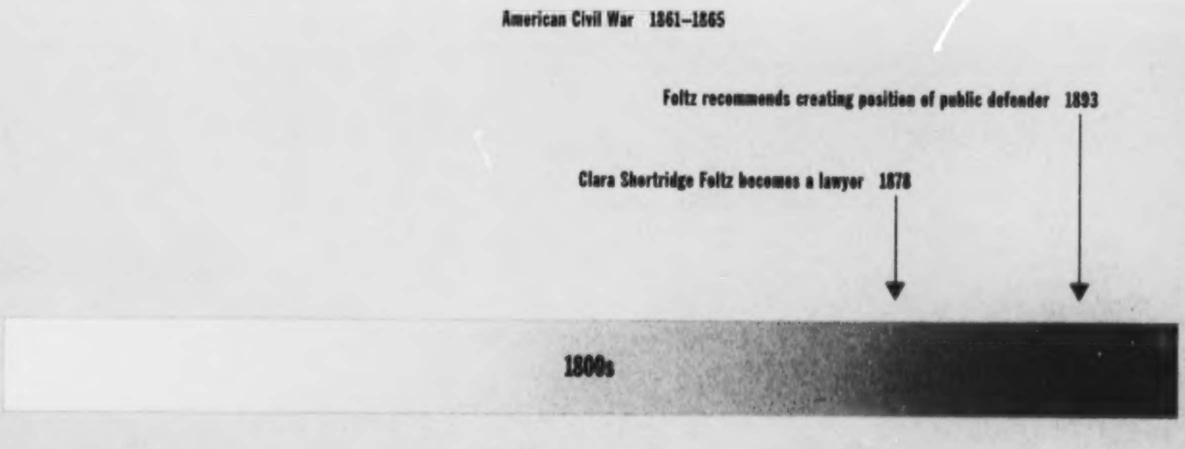
Gideon v. Wainwright, a Landmark Case

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the U.S. Supreme Court held that the Sixth Amendment right to counsel was binding upon the states. Clarence Earl Gideon was a poor drifter accused of theft. He fought to have a lawyer appointed to his case. Following the precedent of the *Betts* decision, lower courts denied Gideon's request.

On Gideon's appeal to the Supreme Court, Justice Black wrote: "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.... The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." The court appointed Abe Fortas, a prominent attorney and later Supreme Court justice, to serve as Gideon's pro bono counsel. Fortas successfully pled Gideon's case. Gideon's conviction was overturned, and he was released from prison.

The issue of the right to counsel was not yet settled, however, because *Gideon* involved a felony, or serious charge. It did not address the right to counsel in misdemeanors, or less serious cases. The Court decided that point a decade later in *Argersinger v. Hamlin*, 407 U.S. 25 (1972). It ruled that in any case in which conviction could result in a prison term, counsel must be provided.

Just as important as whether counsel must be appointed is the question of when it must be granted. In *Miranda v. Arizona*, 384 U.S. 346 (1966), the Court said that a person in custody has the right to legal counsel when being questioned by the police or other law-enforcement officials. This is because the Fifth Amendment protects a person's right to avoid self-incrimination. Having a lawyer prevents the accused from giving answers that can make him or her look guilty, simply because the person does not know any better. When


American Civil War 1861–1865
Foltz recommends creating position of public defender 1893
Clara Shortridge Foltz becomes a lawyer 1878
1800s

suspects are told about this right, we say they are being read their "*Miranda* rights."

The Court recognized the special need for juveniles to have a lawyer in triallike hearings in *In re Gault*, 387 U.S. 1 (1967). Fifteen-year-old Gerald Gault was sentenced to serve time in a juvenile correctional center after court proceedings in which he had no lawyer. The Supreme Court reviewed and reversed his conviction.

Later that year, the Court extended the right to legal counsel. A defendant now can ask for a lawyer from the early stages of questioning and lineup to the final stages of sentencing and appeal.

While the idea that everyone should be represented in court—whether one can afford a lawyer or not—sounds good, it brings many problems. First, the huge number of cases and lack of funding means too few lawyers are willing to represent poor people. Second, because of the large demand for legal counsel, each lawyer may be required to take on more cases than he or she can handle. Third, if there is not enough public money to pay for a lawyer's services, should that lawyer be expected to defend the indigent without pay?

Until fairly recently, lawyers who were assigned to indigent cases worked for no pay, or pro bono. When government funds paid lawyers to defend the poor, the pay was low. Low pay sometimes resulted in poor representation, since attorneys willing to work for low pay usually had little experience. Some attorneys would take lots of cases and rush through the court process, unable to represent any of their clients well. In 1970 the Court held that the right to counsel meant the right to *effective* counsel, but the issue of what is effective is still unresolved.

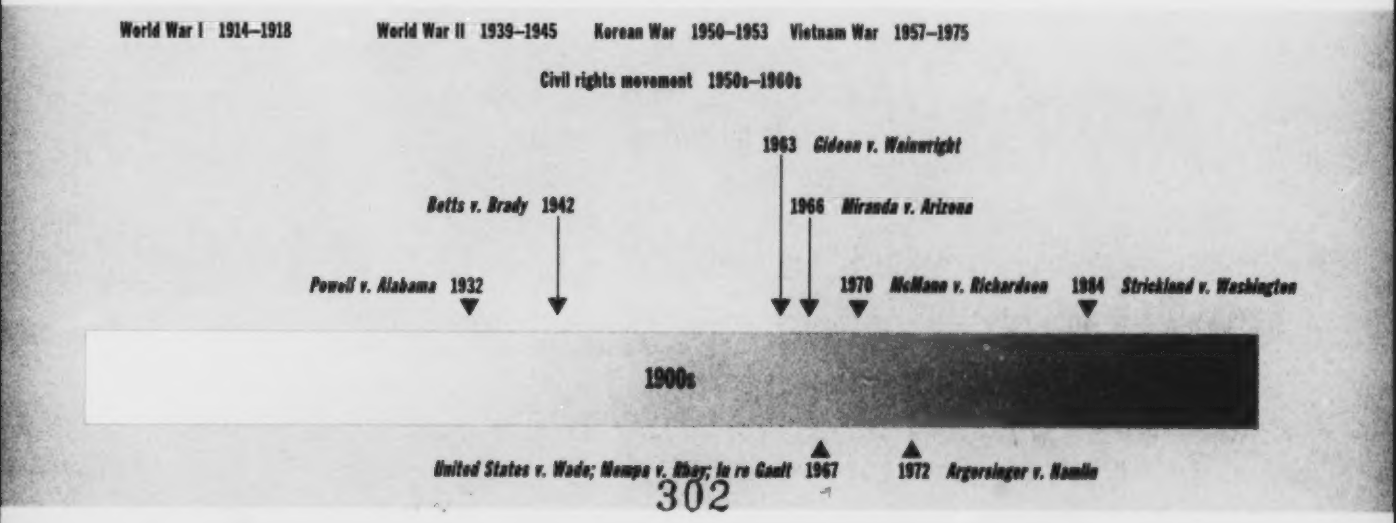
Public Defenders

Two main methods have been used to provide legal counsel to indigent criminal defendants: (1) assigned counsel, in which the judge appoints an attorney who is paid for handling that particular case; and (2) public defender systems, in which salaried lawyers devote all or most of their time to representing indigent criminal defendants. Less frequently used are contract defense systems in which a private attorney or law firm bids annually for a contract to represent indigent people.

A public defender is paid by the government to defend someone accused of a crime who is too poor to hire a private lawyer. The idea of a public defender was conceived by Clara Shortridge Foltz in 1893. Foltz became the first female lawyer in the western states when she joined the California bar in 1878. She suggested that the government pay for the defense of all criminally accused.

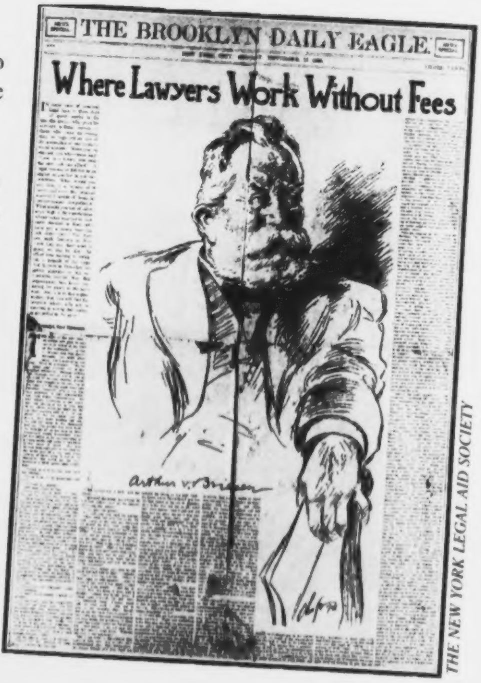
The American Bar Association (ABA) and the National Legal Aid and Defender Association are among the organizations working to ensure that indigent criminal defendants are represented only by attorneys who are trained in criminal law and trial procedures, have the resources to call investigative and expert witnesses, and are paid sufficiently so that they have enough time to work on a case.

We cannot have equal justice until both defendants who can afford lawyers and those who cannot have effective legal counsel. Legal representation of our country's indigent people is not just a noble and worthwhile idea; it is also a constitutional guarantee. ◆


World War I 1914–1918
World War II 1939–1945
Korean War 1950–1953
Vietnam War 1957–1975
Civil rights movement 1950s–1960s
1963 Gideon v. Wainwright
Betts v. Brady 1942
1966 Miranda v. Arizona
Powell v. Alabama 1932
1970 McMann v. Richardson
1984 Strickland v. Washington
1900s
United States v. Wade; Mempa v. Rhay; In re Gault 1967
1972 Argersinger v. Hamlin

Heroes of Indigent Defense

Our legal system now accepts that poor people accused of a crime who might serve time are guaranteed free legal representation. That acceptance was gained through the work of committed people, such as these.



THE BROOKLYN DAILY EAGLE.

Where Lawyers Work Without Fees

Arthur v. Briesen

THE NEW YORK LEGAL AID SOCIETY

- **Clara Shortridge Foltz** became the first female lawyer in the western states in 1878. Denied admission to Hastings College of Law, California, because of her gender, Foltz sued the college and won the right to attend. She declined to do so, however, because she had passed the California bar exam and was already practicing law. It was Foltz who first proposed that the state provide and pay for a public defender in all criminal cases. She is credited with creating the public defender model. After her death, she was awarded a law degree from Hastings in 1991.
- **Anthony Amsterdam** is Judge Edward Weinfeld Professor of Law and Director of the Lawyering Program at New York University School of Law. He is one of the foremost advocates and scholars in criminal law, criminal procedure, and civil rights. He has worked to see that both middle-class and poor people have legal representation equal to that of the wealthy.
- **Abe Fortas**, a distinguished lawyer and later an Associate Justice of the U.S. Supreme Court, was pro bono counsel in the landmark *Gideon v. Wainwright* decision that the states must provide a free attorney to any person accused of a felony who cannot afford one.
- **General Charles L. Decker** headed the National Defender Project for the National Legal Aid and Defender Association from 1964 to 1969. The National Defender Project was funded by the Ford Foundation. Through General Decker's unparalleled leadership, more uniform standards for defendant services were developed and implemented through pilot projects throughout the United States. Becoming permanent, the pilots served as models for many of today's defender programs.
- **Three heroes of legal aid**—A. von Briesen, C. E. Hughes, and H. Tweed—also made notable contributions to indigent defense. See page 11. ◆

Books on Indigent Defense

Gideon's Trumpet by Anthony Lewis relates the story of Clarence Earl Gideon, a poor, middle-aged Florida drifter, who in 1961 was accused of theft, a felony charge in Florida. Henry Fonda starred in a movie by the same title.

Scottsboro—A Tragedy of the American South by Dan T. Carter tells the story of the Scottsboro boys, nine African-American youths from Alabama who were accused of raping two white women in 1931. Eight were found guilty and sentenced to die. The ninth person's trial was declared a mistrial. The convictions were overturned by the U.S. Supreme Court in *Powell v. Alabama*. In 1977 the last living Scottsboro defendant, Clarence (Willie) Norris, was pardoned by Alabama governor George Wallace.

Notable American Women: A Biographical Dictionary by Edward T. James includes the story of Clara Shortridge Foltz.

Benchmark Indigent Defense Cases

These U.S. Supreme Court cases helped establish the right of poor people to have a lawyer's help when accused of a crime, if they might have to serve a jail sentence.

Powell v. Alabama, 287 U.S. 45 (1932). *Powell* was the first and most important case to extend the Bill of Rights to the states by applying the Fourteenth Amendment. In *Powell*, the U.S. Supreme Court overturned the convictions of indigent African-American youths who had been charged with raping two white women, found guilty, and sentenced to death.

The Court found the youths' trial to be gravely unjust. The ruling focused on the youths' lack of legal counsel in a capital case (one in which a person found guilty might be executed). Rather than refer to the Sixth Amendment right to counsel, the Court pointed out constitutional rights of due process in the Fifth Amendment that extend to defendants in state criminal courts through the Fourteenth Amendment. This ruling created a right to a lawyer for indigents facing capital charges in exceptional circumstances.

The Scottsboro boys, as the defendants were called, were retried and found guilty. On the second appeal, their convictions were reversed because of the exclusion of African-American jurors. The Court made an effort to make sure some jurors would be African-American. But at their third trials, the boys were convicted once more by all-white juries chosen from a racially mixed jury pool.

Betts v. Brady, 316 U.S. 455 (1942). While *Powell* created a right to counsel in state courts under exceptional circumstances, the Court in *Betts* defined "exceptional" only as facts and circumstances that offended commonly held ideas of fairness.

In *Betts*, the Court looked at Fifth Amendment due-process rights as the reason for assigning a lawyer, rather than the Sixth Amendment guarantee of counsel. Dissenters in *Betts* noted the double standard the ruling provided; greater constitutional protection was provided for defendants in federal courts than in state courts. Twenty-one years would pass before this inequity was challenged.

Gideon v. Wainwright, 372 U.S. 335 (1963). Clarence Earl Gideon was a poor, middle-aged drifter charged with theft, a felony offense in Florida. He was convicted and sentenced to prison. Having read many law books in prison, Gideon realized his Sixth Amendment right to legal counsel had not been met. He appealed his case and won.

In ruling for Gideon, the Court reversed its *Betts* decision. It now recognized that the due-process rights of the Fifth Amendment included the Sixth Amendment right to counsel.

Argersinger v. Hamlin, 407 U.S. 25 (1972). A decade after *Gideon*, the Court in *Argersinger* extended the right to counsel to misdemeanor cases that might result in a person found guilty serving time in prison.

Miranda v. Arizona, 384 U.S. 436 (1966). Ernesto Miranda was arrested at home and taken to a Phoenix police station. He was questioned by police and after two hours confessed to a crime. He was subsequently tried, convicted, and sentenced to prison.

Miranda did not have an attorney present when he signed his confession. The Court reasoned that it was difficult to tell whether the suspect waived his right to counsel and signed the confession willingly and knowingly. If he did not, then the confession should not have been used as evidence at trial.

Miranda showed the Court's concern that pretrial rights be extended to all accused people. These rights include (1) the right to remain silent; (2) the right to be told that any statement made may be used against the accused person; (3) the right to have an attorney present during questioning; and (4) the right to have an attorney appointed before questioning if the accused person wants a lawyer and cannot afford one.

In 1967 the Court extended the right to a lawyer back to the time of lineup in *United States v. Wade*, 388 U.S. 218, and forward to the time of sentencing in *Mempa v. Rhay*, 389 U.S. 129.

In re Gault, 387 U.S. 1 (1967). In this case, the Court recognized the special need for juveniles to have a lawyer in triallike court hearings. Gerald Gault was 15 years old when, after a number of court proceedings in which he had no counsel, he was sentenced to a juvenile correctional center for up to six years. Gault appealed. The Court ruled that as a juvenile, he had the same constitutional right to counsel as an adult.

McMann v. Richardson, 397 U.S. 759 (1970). In this case, the Court emphasized the right to *effective* legal assistance. The ruling was an attempt to improve the service that indigent defendants were receiving.

Strickland v. Washington, 466 U.S. 668 (1984). This ruling made it difficult to prove ineffective representation. The Court decided that only specific defects in a lawyer's work could show lack of counsel. ◆

Legal Services and American Cities

This article discusses both criminal and civil legal aid programs in New York and Chicago. Only federally funded programs are described in Atlanta, Cincinnati, and San Diego. These cities provide many other free legal services, including pro bono work.

New York

As one might expect, New York has the longest history and the most complicated system of legal aid programs. The organized delivery of legal services to the poor in New York City began in 1876 with the founding of the German Legal Aid Society, the first program of its kind in the nation. The society was established as a private nonprofit organization to aid the thousands of recently arrived German immigrants unfamiliar with the laws and customs of their new home. It was not long before the German Legal Aid Society became The Legal Aid Society serving all poor New Yorkers.

From the beginning the society provided both civil and criminal defense representation, but during the early years of its existence the society furnished legal assistance in relatively few criminal cases. A separate criminal branch did not come into being until 1910. During the following five years, the society gradually expanded its criminal defense services throughout the state and federal courts of criminal jurisdiction in New York. In 1963, the year *Gideon v. Wainwright* was decided by the United States Supreme Court, the Criminal Courts Branch of the society provided representation to indigent defendants in more than 57,000 cases, all with private funds.

Today, through its six operating units, The Legal Aid Society serves more than 300,000 clients annually. Under various agreements with the city, state, and federal governments, it is the primary defender in the state and federal court systems at the trial and appellate levels and as law guardian for children in the Family Court. The society also supplies civil legal representation through neighborhood offices in each borough of the city and a number of specialized units. That representation is funded by private philanthropy, largely from the private bar, and by the various other sources including the Legal Services Corporation, the Interest on Lawyers' Account Fund, state and local government grants, and United Way.

The criminal defense services the society provides are supplemented (primarily in cases involving conflicts) by private attorneys who are paid an hourly rate by the city of New York for providing such services. The Appellate Defender, Inc., picks up conflicts cases and the Neighborhood Defender Services helps out in Harlem.

The other major provider of civil legal services in New York City is Legal Services of New York, Inc., (LSNY), formerly known as Community Action for Legal Services (CALS). LSNY coordinates most of the Legal Services Corporation funding in New York City. It distributes money to eight delegate agencies (which operate neighborhood legal services programs throughout New York City) as well as to some of the programs of the Civil Division of The Legal Aid Society. LSNY also receives funding from the Interest on Lawyers' Account Fund, state and local government grants, and United Way, as well as some private funding.

The two main civil legal services programs, The Legal Aid Society and LSNY, also work with the private bar to increase the availability of civil legal services. The Volunteer Division and Civil Division of the society utilize the services of approximately 1,000 pro bono attorneys and paralegals. LSNY works closely with Volunteers of Legal Services (VOLS), which serves as an umbrella for volunteer efforts, and many of its delegate agencies undertake volunteer programs as well. Bar associations including the Association of the Bar of the City of New York, the New York County Lawyers' Association, the Brooklyn Bar Association, and the Queens Bar Association have pro bono projects.

Virtually all the law schools in New York City run clinical programs that assist in the provision of legal services and civil, juvenile, and criminal defense. In addition, many of the law students at these schools undertake pro bono work as well.

Chicago

In 1886 the Chicago Women's Club and other women's organizations formed the Protective Agency for Women and Children, in part, "to protect women and girls...in financial matters and redress wrongs and injustices." In its first year, the Agency handled 156 complaints, mostly wage claims. The Agency's work was the beginning of legal aid in Chicago, the second city in the nation (after New York) to recognize the needs of urban poor people and immigrants.

The Bureau of Justice, founded in 1888 by the Chicago Society for Ethical Culture, also worked to secure legal protection for men and women and to improve laws and the legal system. In 1905 the Bureau and the Protective Agency combined to form the Legal Aid Society of Chicago. But even as its caseload (both civil and

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(Sources: Susan B. Lindenauer, The Legal Aid Society of New York; Annual Report of the Legal Services Corporation, *Fiscal Year 1977-1978;* Chicago Daily Law Bulletin, *September 22, 1986.)*

criminal) and its legislative activity increased, funding remained scarce. In 1919 the society became part of United Charities of Chicago and was renamed the Legal Aid Bureau. This alliance provided access to trained social workers as well as increased funding. The Bureau's caseload more than doubled in its first two years.

Eventually, the Illinois Department of Labor took over wage claims, and the Public Defender began to handle criminal cases. The Legal Aid Bureau was able to focus on civil work, continuing to handle suits for debt, bankruptcies, evictions, foreclosures, breaches of contract, and consumer issues. For many years the Bureau remained the major source of free legal aid in the city. Then in the 1960s, the federal government offered funding for legal assistance as part of its social programs. This funding led to the creation of the Legal Assistance Foundation of Chicago, which operates through a network of neighborhood offices.

Although the Legal Aid Bureau and the Legal Assistance Foundation are the largest providers of free legal services in Chicago, many other organizations offer some form of legal help to those who cannot afford to pay fees. Through organizations, such as Chicago Volunteer Legal Services and the Lawyers Committee for Civil Rights Under Law, volunteer attorneys and paralegals offer pro bono services.

Atlanta

When it was launched around the turn of the century, Atlanta's legal aid effort was the first of its kind in the South. Despite doing good work, the organization lost the interest of lawyers and eventually disappeared.

It was resurrected in 1924 by E. Smythe Gambrell, a young lawyer who had worked with the Harvard Legal Aid Bureau while a law student. Gambrell and other lawyers formed the Atlanta Legal Aid Society. The society's first legal counsel was Major J.L.R. Boyd.

Boyd believed the society should strive to change laws that hurt the poor. With this in mind, he launched a campaign to eliminate the loan sharks (moneylenders who charge a very high rate of interest) who preyed on poor people throughout the city. "Salary buyers," for example, provided $20 loans to borrowers when they signed away their upcoming $22 paychecks. On payday, the borrowers would have to give their paychecks to the lenders and so needed another loan to get through the week. This often continued for years.

Boyd publicized such abuses, organized lawyers to represent poor people against salary buyers, and prepared legislation that made it harder for loan sharks to operate.

During the 1940s and 1950s, demand for legal aid grew along with Atlanta itself. The Legal Aid Society's budget didn't grow nearly as quickly, totaling only $55,924 in 1964. The creation of the OEO Legal Services Program led to increased funding, however, and by 1972 the society's budget had risen to $1 million.

Cincinnati

A group of prominent citizens founded the Legal Aid Society of Cincinnati, the country's seventh such society, in 1907. The legal problems its clients faced—such as consumer issues, poor housing, and installment-buying abuses—were remarkably similar to those clients still face today. The society worked to limit lending abuses and persuaded the Ohio legislature to pass a bill taking aim at loan sharks.

The society believed that the legal system could not dispense justice unless it was open to everyone regardless of income. "Lawyers are morally obligated to give a portion of their services free to the poor for whom the Legal Aid Society exists," declared then-leader Walter Knight in 1912.

At the beginning of this century, the society began an intern program that gave law graduates work experience in a legal services office. In 1966 the society started airing a radio program on legal rights and responsibilities, which continues today.

For much of its history, the Cincinnati society was headed by Murray Seasongood. Seasongood became interested in legal services in 1903, while still a law student at Harvard. He earned national recognition in the early 1920s, when he led a political reform movement that defeated the leaders of Cincinnati. Seasongood himself was elected mayor. His support for legal services never wavered—he was still working on behalf of this cause when he was 100 years old.

San Diego

A soldier who died fighting for America during World War I was responsible for founding San Diego's legal aid movement. DeWitt Mitchell, who was 22 when he died in 1918, left $20,000 in trust to open the office of Public Attorney in the City of San Diego.

According to Mitchell's will, the public attorney should be a male who would work full time serving "persons who have saved a little money or other property, and who are in danger of losing it." According to the will, the public attorney could not handle criminal matters, divorces, or annulments.

This trust funded the Public Attorney's Office until 1953. That year, a Legal Aid Society was formed and received funds through other sources. A court ruled that because other money was available, the society could disregard Mitchell's rules against female lawyers, marital cases, and poor clients who did not save.

Today the society serves an area of 45,000 square miles. With LSC and IOLTA funding, by 1978 its budget rose to nearly $1 million. The society's clients include poor Hispanic, African, and Asian Americans. It also serves migrants and 17 Native American reservations. ◆

Student Handout

The American Bill of Rights

Judy Norris

To the Teacher
Together with the students, read and discuss the American Bill of Rights. Point out that the Bill of Rights is the first ten amendments to the Constitution of the United States. Ask students to identify which amendments are particularly applicable to criminal law. Emphasize that since the adoption of the Bill of Rights in 1791, the Supreme Court has used it as the basis for its decisions in many criminal cases. You may want to discuss these cases as you review specific amendments.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment II

A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Amendment III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment VIII

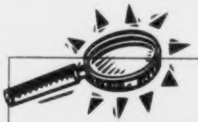
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.



STATEMENT OF MIRANDA RIGHTS

Since the Court ruling in *Miranda*, law officers must provide people they arrest with this basic information about their rights.

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to consult a lawyer and have a lawyer present with you while you are being questioned.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish.
5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

Use this page to help review your understanding of the American Bill of Rights and criminal law.

Select one of the choices given to complete each statement. Underline your answer.

1. The American Bill of Rights are the first ten amendments to the ___.
(Declaration of Independence, U.S. Constitution, Emancipation Proclamation)

2. The right to due process of the law is identified in the ___.
(Fifth Amendment, Sixth Amendment, Seventh Amendment)

3. The guarantee of a right to counsel is part of the ___.
(Fifth Amendment, Sixth Amendment, Seventh Amendment)

4. The Fifth Amendment guarantees your right to ___.
(have a jury trial, avoid proving yourself guilty, be served a search warrant)

5. The Eighth Amendment protects a person from ___.
(unreasonable searches, being tried for the same crime twice after being found not guilty, cruel and unusual punishments)

6. The Fourteenth Amendment extends to the states the due-process rights of the ___.
(Fifth Amendment, Sixth Amendment, Seventh Amendment)

7. The Sixth Amendment does not guarantee the right to ___.
(a speedy trial, reasonable bail, supporting witnesses)

8. The Fourth Amendment requires federal officers to have a warrant to ___.
(search a house, accuse someone of a crime, set bail)

The following items identify legal terms and criminal cases. Write the letter of the matching term or case next to each item.

____ 9. Law derived from judicial decisions that create precedents.

____ 10. Law passed by the legislature.

____ 11. The first case in which the right to counsel in felony cases was held to be binding on the state courts.

____ 12. This process enables a convicted person to ask a higher court to review his or her case.

____ 13. This case extends the right to counsel to pretrial stages of the judicial process.

____ 14. In this case, the right to counsel was determined to apply only in exceptional cases in which due-process rights were being denied.

____ 15. The first case to apply the right to counsel to state courts in a capital case.

____ 16. The special need for juveniles to have the protection of counsel was found in this case.

____ 17. In this case, the Court extended the right to counsel to all misdemeanor cases that might result in prison sentences.

____ 18. Rights that are of such fundamental importance as to require compliance with standards of fairness and justice.

____ 19. A crime of a serious nature, for example, murder or robbery.

____ 20. The constitutional right of a criminal defendant to have a court-appointed attorney if he or she is unable to pay for one.

a. case law
b. *Miranda v. Arizona*
c. *Powell v. Alabama*
d. *In re Gault*
e. due-process rights
f. *Betts v. Brady*
g. right to counsel
h. *Gideon v. Wainwright*
i. *Argersinger v. Hamlin*
j. statutory law
k. appeal
l. felony

Babcock Bamberger Lefstein Ehrlich Hatter McCalpin Murray Neuhard Smith

Round Table

Frank Kopecky & Christopher Kopecky

The Round Table presents the opinions of nine professionals serving our legal and justice systems in various capacities. Their views have been expressed in response to specific questions about providing representation in criminal and civil matters to those unable to pay for lawyers.

Babcock

Barbara Allen Babcock is the Ernest W. McFarland Professor of Law at Stanford University in Stanford, California, and author of Western Women Lawyers, *chronicling the life of nineteenth-century lawyer Clara Shortridge Foltz. Ms. Babcock was U.S. Assistant Attorney General in charge of the Department of Justice Civil Division.*

- *Attorneys are provided to poor people in most criminal cases and legal aid is available for civil cases in many places. In your opinion, is the system of providing counsel adequate?*

Babcock: The system for providing counsel to poor people in civil cases could stand improvement in many places, of course. But the revitalization of legal aid and the pro bono efforts of law firms, law school clinics, and other types of legal fellowships and specialized law firms make the civil side much, much better than the criminal justice system in providing counsel to those unable to pay.

The provision of counsel for the indigent accused is a joke in many places, where defendants plead guilty to serious charges without anyone seriously considering the merits of their case or defense. The Sixth Amendment to the Constitution guarantees effective assistance of counsel, but it is a promise broken. The inadequate counsel problem is especially acute in death-penalty cases, for which there simply are not enough lawyers with the skill and resources to present the case for the defense.

People who see O. J. Simpson on trial may get some idea of what a rich person can afford for a defense. Everyone should realize that most people charged with double homicide do not have anything even resembling the legal thought and care that has gone into this defense.

The problem of the totally inadequate counsel who does not present the client's valid defenses will be even worse with the three-strike laws.

EQUAL JUSTICE UNDER LAW

• *Do you believe lawyers as a group have a special obligation to provide counsel, and what do you believe is the best method for providing legal representation?*

Babcock: I think the best method for providing criminal defense services is through a mixed system of representation in which a strong, well-funded public defender who has a staff of investigators and social workers sets the pace and tone of representation, and aids the private bar, who take all the cases that the public defender cannot handle.

The main problem that public defenders face is that their funding never keeps pace with their caseload. There is no lobby for the indigent accused. The problem does not result in ineffective assistance, however, if there is some safety valve, such as the regular participation of the private bar in taking cases of all kinds that would otherwise overload the public defender.

• *Should the right to counsel that exists in criminal law be expanded into other areas of the law? Should special efforts be made to provide counsel for juveniles?*

Babcock: I have a hard time thinking about expanding the right to counsel when the criminal justice system is in such dire straits and great need. Ineffective assistance of counsel is the most serious problem facing the criminal justice system today.

• *One of the goals of the legal system is equal justice for all. What does the phrase mean to you in the context of the right to legal representation?*

Babcock: I do not think that equal justice for all can be achieved without adequate legal representation. Our essential notions of due process all turn on a meaningful opportunity to be heard. For that, the poor person, untrained in law and adversary presentation, needs counsel.

Frank Kopecky is professor of legal studies at Sangamon State University in Springfield, Illinois, and editor of the Illinois State Bar Association Law-Related Education Newsletter. *Christopher Kopecky, a recent graduate of the University of Wisconsin–Madison, is working as Professor Kopecky's paralegal.*

Bamberger

Clinton Bamberger was the first director of the OEO Office of Legal Services. He developed strong national support for legal services for the poor and promoted many policies governing legal aid programs. Officially "retired" today, Mr. Bamberger is assisting with clinical legal education work in Nepal, as well as pro bono work in South Africa and the Baltimore area. Among many distinctions for his dedication to the cause of equal justice, Mr. Bamberger received the ABA Litigation Section's John Minor Wisdom Public Interest Award.

• *Attorneys are provided to poor people in most criminal cases and legal aid is available for civil cases in many places. In your opinion, is the system of providing counsel adequate?*
Bamberger: No, in fact, I think it is almost shameful. There are only enough lawyers now to really help about 20 percent of the poor people in civil cases. Every day we read in the paper about cases in which people charged with crimes are poorly represented. The greatest shame is that the Congress often prohibits legal aid lawyers from helping poor people who fall into certain categories or prohibits them from doing certain things for these people. For example, disqualifications may include abortion cases, immigration proceedings, and welfare cases. The attorneys may also be prevented from raising constitutional issues in indigent cases. So it's as if we have two constitutions—one is free, and people have to pay for the second.

• *Currently criminal and civil representation is being provided to indigent persons through a variety of means. Would you describe any programs or approaches such as the use of paralegals or simplification of the process to allow for self-representation?*
Bamberger: Bar associations have committees that provide help. Most lawyers, and I mean particularly the hundreds of thousands of lawyers in small towns, in solo practice, and in small firms everywhere, do a lot of free work. Legal Aid and public-interest law firms do a lot, but not enough.

Paralegals could do much more if the lawyers would give up their control and restriction of paralegal work. With the cost of education through college and law school being so high, there will never be enough people fully trained as lawyers. Lawyers do many things that don't require special training and could be done by paralegals. I think that at the moment paralegals are restricted by lawyers who think that they might lose business.

Much more law and procedure should be "delawyered." Statutes and court papers should be written in simple language and ought to be easily available to people. There is much more we can do with computers and other technology. For instance, the Maricopa County Court [Phoenix, Arizona, is in Maricopa County] has designed a program that places a computer right in the courthouse. Many relatively simple procedures for which people are now required to pay lawyers' fees can be done very simply with this computer. There are lots of things we can do to make the law more accessible to people through technology.

• *Do you believe lawyers as a group have a special obligation to provide counsel, and what do you believe is the best method for providing legal representation?*
Bamberger: I think lawyers have a special obligation. In the United States and many other countries in the world, lawyers have very special privileges and skills. I think you cannot say that in order to get justice you have to hire a particular kind of person who must speak for you and then not make that person available. In a society such as ours that requires money to hire that special person, somehow the state should make that person available for those without money.

I think we can't afford to make a choice about what is best [pro bono programs, contracts with attorneys, public defender or legal services offices]. We need to do all of these things. If I were forced to choose, then I would choose public defenders and legal services offices. I make that choice because the law has become so complex, so specialized. I think the poor need lawyers who understand that law better, who are specialists in that law, and who have empathy with those clients.

• *Should the right to counsel that exists in criminal law be expanded into other areas of the law? Should special efforts be made to provide counsel for juveniles?*
Bamberger: Yes, I think it should be expanded. The advice and the advocacy of lawyers should not be available only to the rich and the powerful. The price of a lawyer's fee should not shut the courthouse door. It doesn't mean anything to say that anybody can come into the courthouse unless, in fact,

they can get justice. In our system you must have a lawyer to make your case before the court.

I think legal services should be provided to minors. If children are going to be affected by what the court does, then the judge should hear what the children have to say. Lawyers may be necessary for this. Often the perspective of the child sheds new light on the problem.

• *One of the goals of the legal system is equal justice for all. What does the phrase mean to you in the context of the right to legal representation?*

Bamberger: It means justice for all. It means that justice is equal for both the rich and the poor, the powerful and the weak, that everybody can have justice.

Lefstein

Norman Lefstein is Dean and Professor of Law at the Indiana University School of Law–Indianapolis. He has played leadership roles in the defender movement, with principal publications in the areas of criminal justice and professional responsibility. He was chair of the ABA Section of Criminal Justice and Reporter for the Second Edition of the ABA Criminal Justice Standards Relating to the Prosecution and Defense Functions, Providing Defense Services, and Pleas of Guilty. Currently, Dean Lefstein is chairman of the Indiana Public Defender Commission.

• *Attorneys are provided to poor people in most criminal cases and legal aid is available for civil cases in many places. In your opinion, is the system of providing counsel adequate?*

Lefstein: It is not adequate and sometimes it is absolutely terrible. I've been directly or indirectly involved with issues related to adequate defense counsel for most of my professional life, and I have continued to see the same problems over and over again, even though I suppose there are places where there have been significant improvement. It is an eternal struggle to provide adequate funding. There are some social problems that probably are not going to be aided by more money, but criminal defense services is not one of them. Adequate funding is essential to make the system work.

• *Currently criminal and civil representation is being provided to indigent persons through a variety of means. Would you describe any programs or approaches such as the use of paralegals or simplification of the process to allow for self-representation?*

Lefstein: There are a myriad of programs throughout the country, but I do not know that I am close enough to them these days to single out a particular program. I chair the Indiana Public Defender commission, which has had a very significant impact on death-penalty cases, and I think it suggests a model for use elsewhere. The commission provides compensation to counties for 50 percent of the cost of representation in death-penalty cases. In order to qualify for that money, the counties must appoint two lawyers and insure that the lawyers are adequately compensated, expert services are available, and lawyers have the requisite qualifications.

Paralegals are vital. Lawyers by themselves simply cannot operate effectively or efficiently. The paralegal plays a vital role in the collection of evidence, investigations, interviewing, and putting together materials. You could go on and on because you just can't do it without them.

In the criminal context, the complexity of criminal procedure and law is not something that the layperson can really deal with. There is really not much possibility of simplifying procedures to allow for self-representation.

• *Do you believe lawyers as a group have a special obligation to provide counsel, and what do you believe is the best method for providing legal representation?*

Lefstein: This is a difficult question in the criminal context. On the one hand, I believe, just like the Rules of Professional Conduct recognize, that lawyers should assume a pro bono responsibility to help the poor and be of service in other areas of public concern. The difficulty is when you talk about pro bono in the context of criminal cases. I always worry if it is suggested that lawyers have an obligation to work for free or for little charge when the state has a constitutional duty to provide adequate representation. The dimension of the problem is such that lawyers as a group cannot be expected to provide the representation on a pro bono basis. It will not get done, and it will shortchange the accused and make a mockery of the Constitution.

It is the responsibility of government to provide adequate representation in criminal cases in much the same way as we provide judges, bailiffs, sheriffs, and police. As Chief Justice Burger said many years ago, the criminal justice system is like a three-legged stool requiring the judge, the prosecutor, and the defense lawyer. If any one of the those legs is not adequately supported, the stool does not stand.

I agree strongly with the standards of the American Bar Association, which recognize that there is no delivery-system model that should be used exclusively. I think it is a mistake to develop systems of public defense representation in which the private bar does not remain involved. It is important that the private bar remain involved both as a safety valve and as a group of lawyers who will be concerned with the administration of criminal justice.

- *Should the right to counsel that exists in criminal law be expanded into other areas of the law? Should special efforts be made to provide counsel for juveniles?*

Lefstein: I think you can certainly make a very strong case for expanding the right to counsel. There are some modest movements in that direction because, so often in other areas outside the criminal context, the right to defend meaningfully in the proceeding is dependent upon having a lawyer. Laypersons simply cannot do it effectively on their own. Therefore, I am sympathetic to the movement to expand the right to counsel. Because we haven't always done a perfect job in making counsel available in the criminal context, I worry about how well we will do it in other contexts.

- *One of the goals of the legal system is equal justice for all. What does the phrase mean to you in the context of the right to legal representation?*

Lefstein: In the criminal context, [the phrase means] having defense counsel who are capable of adequately representing the clients. That means they are sufficiently trained and compensated and have access to the kinds of support they need in order to meaningfully provide effective legal representation. The right to legal representation is more than simply having a warm body present.

... [It] is only by emptying yourself for others that you fill yourself with meaning. It is only by giving yourself away that you find yourself.

Professor Charles DiSalvo, West Virginia University College of Law 1994 Hooding Ceremony Address, Morgantown

... But even equality has its price. People don't just walk into court and plead their own case with any real chance to win. Especially not poor people. Most often, they haven't the faintest idea what their rights are. It used to be said that we had the best justice money can buy. The Legal Services Corp. is erasing that cynical stigma. We have the best justice—period.

St. Petersburg Times, March 8, 1981

Ehrlich

Thomas Ehrlich is a visiting professor at the Sanford Institute of Public Policy at Duke University in Durham, North Carolina. He is President Emeritus of Indiana University. Mr. Ehrlich was the first president of the Legal Services Corporation. He has authored or co-authored books and articles concerning equal justice for the poor.

• *Attorneys are provided to poor people in most criminal cases and legal aid is available for civil cases in many places. In your opinion, is the system of providing counsel adequate?*

Ehrlich: No. More support for civil legal help is needed both through federally supported and state-supported legal services offices and through voluntary efforts by lawyers. I think this is an important time for the Legal Services Corporation to reestablish the premise that civil legal help to poor people in this country is an important part of the total legal system, and that poor people should not be outside the legal system, which they are without effective legal help.

• *Currently criminal and civil representation is being provided to indigent persons through a variety of means. Would you describe any programs or approaches such as the use of paralegals or simplification of the process to allow for self-representation?*

Ehrlich: There are efforts in a number of states to expand the delivery of legal services, and these efforts should be encouraged. I cannot comment at this time concerning a model program.

I think paralegals can play an important role in the provision of legal help. In Legal Services Programs over the years, paralegals have been a key to the provision of effective help and under the supervision of lawyers can do a great deal on behalf of clients.

Also I have written about efforts to reform the legal system, to simplify the process, and to make it more user friendly. There are a number of steps that have been taken in the various arenas to simplify procedures and more are needed.

• *Do you believe lawyers as a group have a special obligation to provide counsel, and what do you believe is the best method for providing legal representation?*

Ehrlich: Lawyers have a monopoly on the provision of legal services, and with that monopoly comes a responsibility to give some of their time, energy, and effort to those who cannot afford legal services. While I think there is an underlying responsibility for federal and state governments to provide civil help as well as help to those accused of crimes, the bar has a supplementary and complementary responsibility to provide some of its services as well.

My experience suggests that a core of ongoing staff attorneys in a publicly funded agency is essential, but I think this can be supplemented through pro bono programs, contracts with private attorneys, and other arrangements.

• *Should the right to counsel that exists in criminal law be expanded into other areas of the law? Should special efforts be made to provide counsel for juveniles?*

Ehrlich: I think there should be a right to counsel in some civil areas, particularly when one is required to use the legal system. It seems only reasonable that the government provide some legal help. Exactly where the lines are drawn could be subject to debate, but I think representation is needed in many instances.

We view the legal system as an alternative to blood on the streets and we require people to use the legal system. If we are going to do this, then we must provide civil legal help as well as help for those accused of crimes. Additionally, there may be a special obligation to provide counsel for minors in juvenile court and in custody cases.

• *One of the goals of the legal system is equal justice for all. What does the phrase mean to you in the context of the right to legal representation?*

Ehrlich: It means some opportunity for all people not only to live within the law, but to be able to use it and the legal system when they need to.

Hatter

Terry J. Hatter, Jr., is the U.S. District Court Judge for the Central District of California in Los Angeles. Judge Hatter was a legal services lawyer, an assistant public defender in Chicago, and an assistant U.S. Attorney in Sacramento, California. He was Regional Legal Services Director for the OEO Legal Services Program in San Francisco, and he has held numerous posts addressing justice system and legal assistance issues.

• *Attorneys are provided to poor people in most criminal cases and legal aid is available for civil cases in many places. In your opinion, is the system of providing counsel adequate?*
Hatter: Clearly it is not on the civil side. What we need to do is provide more funding for the Legal Services Corporation. We need more funding at the state levels through bar associations, legislatures, or both. We need also to attempt to force Congress, when it passes laws, such as Title VII, that provide for attorney representation, to provide the funds so that attorney representation is made viable.

• *Currently criminal and civil representation is being provided to indigent persons through a variety of means. Would you describe any programs or approaches such as the use of paralegals or simplification of the process to allow for self-representation?*
Hatter: Both the Orange County and Los Angeles County Bar Associations are actively at work putting together projects to aid juveniles both in family court and juvenile court.

I'd like to see a greater role for paralegals and others who can provide assistance in administrative hearings, moving a lot of these matters out of the courts and into the administrative arena and also involving poor people more in Alternate Dispute Resolution (ADR). One of the things that concerns me about ADR is that it appears there is going to be a two-tier system of justice. Those who can afford to get out of the courts will use ADR and other types of private judging. The poorest will remain within the system, which will be poorly funded, and receive an even lesser level of justice than they do now.

I've never been opposed to simplifying some of the procedures. At the same time, I feel a certain amount of formality ought to be maintained in the court system, particularly in a society such as ours where there seems to be a lack of civility and a lack of respect for institutions and for the law generally.

• *Do you believe lawyers as a group have a special obligation to provide counsel, and what do you believe is the best method for providing legal representation?*
Hatter: The bar does have a special obligation, being trained in the law and using the law for its livelihood. As well, I believe that the general public bears a responsibility to maintain what many people believe is the fairest justice system in the world. There has to be involvement of the bar to a greater degree because of its relationship to the law, and the general public has an obligation to maintain a minimum standard of justice.

We have to have a combination of [pro bono programs, contracts with attorneys, and government programs] probably with the Legal Services Offices coordinating the efforts. I have always felt this way. There has to be this partnership arrangement. We need all of these component parts to insure proper representation.

• *Should the right to counsel that exists in criminal law be expanded into other areas of the law? Should special efforts be made to provide counsel for juveniles?*
Hatter: Yes, but who is going to fund this, who is going to make this possible?

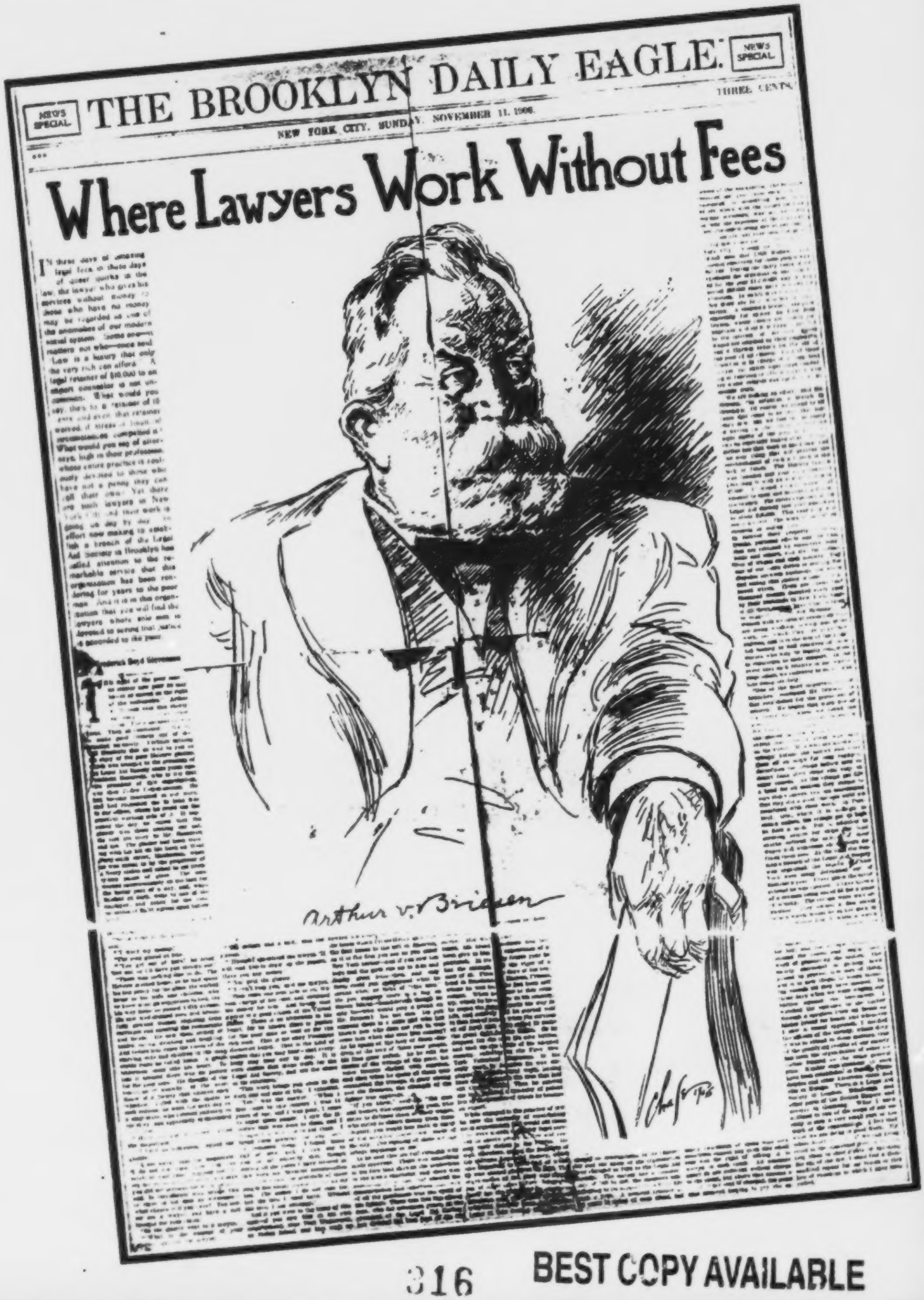
I sat as a juvenile court judge when I was on the superior court over fifteen years ago. In California, juveniles who cannot afford representation are provided representation through the public defender's office. But in the family court area minors often need to be represented. I don't know how that need is taken care of except through pro bono efforts on the part of the local bar associations.

• *One of the goals of the legal system is equal justice for all. What does the phrase mean to you in the context of the right to legal representation?*
Hatter: Given the present makeup of our legal system and its intricacies, it is impossible to have equal justice without equal representation. It is as simple as that.

ual Justice:

THE HISTORY OF THE NEW YORK LEGAL AID SOCIETY

by Susan B. Lindenauer
Counsel to the Executive Director of The Legal Aid Society of New York



NEWS SPECIAL THE BROOKLYN DAILY EAGLE. NEWS SPECIAL

THREE CENTS

NEW YORK CITY, SUNDAY, NOVEMBER 11, 1906.

Where Lawyers Work Without Fees

Arthur v. Briesen

Presented by the Consortium for the National Equal Justice Library, the ABA Standing Committee on Legal Aid and Indigent Defendants, and the ABA Special Committee on Youth Education for Citizenship.

ABA
American Bar Association

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[illegible] Aid Society of New York

A look at the nation's first provider of legal assistance to the poor

Founded in 1876, The Legal Aid Society of New York City, a private, nonprofit law firm, is the largest and oldest provider in this country of legal assistance to people too poor to pay for private counsel. Today, through its six operating units, the Civil Division, the Criminal Defense Division, the Criminal Appeals Bureau, the Federal Defender Division, the Juvenile Rights Division, and the Volunteer Division, the Society provides high-quality indigent defense, civil, and juvenile representation to approximately 300,000 people each year. With a staff of more than 2,000 full-time employees, of whom more than 1,100 are lawyers, it is the largest legal employer in metropolitan New York. The Society assists poor New Yorkers in courts of criminal, civil, and juvenile jurisdiction at the trial and appellate levels in both the state and federal court systems.

Beginnings

But let us go back to the beginning of this first organized provider of legal services. In 1876, when The Legal Aid Society was founded by a group of public-spirited merchants and lawyers, New York City had become home to tens of thousands of recently arrived immigrants who were often non-English speaking and unfamiliar with the laws and customs of their new home. To meet the needs of many of these new arrivals, The Legal Aid Society was established on March 8, 1876, as Der Deutsche-Rechtsschutz-Verein, the German Legal Aid Society, under the auspices of the German Society. In its first year of existence, the Society employed one lawyer who handled 212 cases.

The first attorney-in-chief of the Society was Charles K. Lexow, who served in that position from 1876 to 1887. Archibald R. Murray, the current attorney-in-chief, is the 15th attorney-in-chief. He is the first African American to head the Society's staff.

From its inception, the Society has been governed by energetic and principled boards of directors. The first president of the board of directors was Edward Salomon, who served in that capacity for 14 years. The second president of the Society's board, Arthur von Briesen, was elected in 1890. He was an extraordinary leader in the movement to secure free legal assistance for poor people. His presidency marked a turning point in the history of the Society. By this time, the Society had become self-sufficient; it no longer had to depend on the German Society for financial aid. As Mr. von Briesen assumed the presidency, the Society was receiving the financial and moral support of many prominent members of the bar. It was also serving the legal needs of hundreds of clients of many different nationalities. In 1896, in recognition of the fact that the Society was providing access to legal services for poor New Yorkers, whatever their origin, the Society changed its name to The Legal Aid Society.

President von Briesen also served as a national voice urging the establishment of similar legal aid societies elsewhere in the nation. Modeled after The Legal Aid Society in New York City, legal aid societies were created in Atlanta; Baltimore; Boston; Chicago; Cleveland; Cincinnati; Kansas City; Los Angeles; Newark; Philadelphia; Pittsburgh; Rochester, New York; San Francisco; St. Louis; and Westchester County, New York. Each was a separate private organization governed by its own local board.

Range of Services

Most of the legal matters handled by New York's Legal Aid Society in its earliest days were civil in nature—wage claims, property disputes, landlord-tenant matters, consumer and credit problems, family-law disputes, and the like. However, the founders of the Society clearly indicated that they anticipated

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The articles, lesson plans, and other instructional materials in UPDATE PLUS are designed to help classroom teachers and law-related education program developers educate students about the law and legal issues. A one-year subscription to UPDATE PLUS costs $25. For subscription and back issue information, contact American Bar Association/YEFC, 541 N. Fairbanks Court, Chicago, IL 60611-3314; (312) 988-5735. FOR CUSTOMER SERVICE CALL (312) 988-5522.

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Susan B. Lindenauer is Counsel to the Executive Director of The Legal Aid Society of New York; member, New York State Bar Association House of Delegates, and officer, Criminal Justice Section; former chair, Committee on Legal Assistance of the Association of Bar of City of New York and former chair, Committee on Legal Aid of New York State Bar Association; recipient, New York County Lawyers' Association Award for Outstanding Public Service; President, Columbia University Law School Association, member, Columbia University School of Law, Board of Visitors, and cochair, Committee on Public Interest and Pro Bono.

that the Society would assist poor people who faced criminal charges as well. From the outset the Society handled criminal matters, but because of its limited resources it provided legal assistance in a relatively small number of criminal cases. But it did maintain a presence in the criminal justice system. For example, in 1896, the year the Society changed its corporate name to The Legal Aid Society, the annual report of Society activity describes the case of two boys, named Williamson and Donovan, who had been convicted of robbery and sent to a reformatory. The mother of one of the boys sought assistance for them, stating that a witness in the initial trial had committed perjury. The Society obtained a new trial for the boys, who were then acquitted of the charges. During the same year, President von Briesen urged the assignment of Legal Aid lawyers for duty in the Police Magistrate's Courts "to prevent miscarriages of justice by reason of the summary methods ... employed there."

Expansion

In 1899 the Society expanded its services by opening three branches. The Seamen's Branch was set up to aid poor sailors, who were often of foreign origin and who were taken advantage of by unscrupulous persons who would kidnap many sailors from the dock areas and force them to work on board ships for little or no pay. With the help of the Society, these activities came to a halt, and kidnapping and forcing sailors to work on board ships against their will became a federal crime. The Society also opened a branch on the Lower East Side of Manhattan—the Tenth Ward. This branch first served immigrants coming from southern and eastern Europe; later its clients were largely Jewish immigrants from central and eastern Europe.

During the first decade of the twentieth century, the Society opened branches in Harlem and Brooklyn. In 1910 the Society also formally established its criminal branch by opening an office to serve clients facing criminal charges in a police court, the Essex Market Court, on the Lower East Side of Manhattan. The Society chose to provide ongoing indigent defense representation in this court because of the extreme poverty of the inhabitants of the area. By 1911 the Society was also providing occasional representation in other state and federal courts of criminal jurisdiction.

"Rockefeller Lawyers"

During World War I, a group of lawyers established the Volunteer Defenders Committee to provide representation to indigent persons facing felony charges in the Court of General Sessions in Manhattan. This project was funded initially by John D. Rockefeller, Jr., with two foundations, the Carnegie Foundation and the Commonwealth Fund, also providing substantial support. The attorneys who worked with the Committee were known as "Rockefeller lawyers," and there was great demand for their services.

By 1920 the Volunteer Defender Committee, while retaining its identity as a Society committee, had merged with the Society to become part of the Criminal Branch. Throughout the 1920s and 1930s, the Society expanded its criminal defense services. By the close of the 1930s, the Volunteer Defender Committee had ceased to exist. Organized criminal-defense services were provided solely by the Criminal Courts Branch of the Society. During the mid-1940s, the Society was assisting more than 7,500 indigent defendants annually. In 1947 the Society established a separate unit, the Youth Counseling Bureau, to provide legal assistance to young people charged with criminal activity. It also organized a panel of volunteer lawyers to provide representation in criminal appeals. In 1949 the Criminal Courts Branch of the Society opened an office in the United States Courthouse to provide representation in the United States District Court of New York and in the United States Court of Appeals for the Second Circuit.

In the same year, the Criminal Courts Branch of the Society opened an office in Brooklyn to provide representation in felonies, and two years later an office was added in the Bronx. In 1963, the year *Gideon v. Wainwright*, 372 U.S. 336, was decided by the United States Supreme Court, the Criminal Courts Branch of the Society provided representation to indigent defendants in more than 57,000 cases.

Government Funding of Defense

Until 1965 the indigent defense services provided by the Society were privately funded. Recognizing the Society's long and significant history of providing representation to poor people in New York City, in 1965 the city of New York designated the Society as the primary defender of the poor in criminal matters. Since then, funding for the Society's indigent defense representation in the state courts has come from governments—principally from the city of New York with some supplementation from the state of New York.

At the trial level, indigent defense representation is provided in the state courts by the Criminal Defense Division. Today the Criminal Defense Division is the largest defender office in the country. It represents approximately 70 percent of the criminal defendants in New York City at the trial stage. In addition, the division's law reform unit undertakes impact litigation to address systemic abuses. For example, in *People ex rel.*

continued on page 6

[illegible]ones in the History of The Legal Aid Society

All in Time

The time frame on these pages identifies milestones in the history of The Legal Aid Society of New York. Review the time frame to identify how the Society has changed its services over the years, how it has influenced the development of other legal aid societies, and how the Society has been influenced by outside contributors and events.

You Decide

You are an administrator with The Legal Aid Society. Two people come to you asking for services. One needs help in a civil dispute with a landlord; the other needs assistance to prevent deportation. The Society's caseload is heavy, so it can handle only one additional case. In a small group, make lists of the details of each case. Then discuss which case you will take and determine how you might help the other individual. You might want to use the information on landlord and tenant disputes in the magazine, *Update on Law-Related Education*, Fall 1994.

1876

Der Deutsche-Rechtsschutz-[illegible]in is incorporated by [illegible] of the German [illegible]ide free [illegible]an [illegible]

1890

Turning point in the history of the Society: Arthur von Briesen, a prominent attorney, is elected president. At the beginning of the year, the Society has 81 members contributing to its support. By the end of the year, the number has grown to 170 and, for the first time in its 14 years of existence, the Society is self-sufficient and does not depend on the German Society for support. By this time, it is the German Legal Aid Society in name only. Many prominent members of the bar become members, and the Society is serving hundreds of immigrants who are not of German descent.

Among the 4,078 cases handled that year: returning a child wrongfully taken from its mother, obtaining a separation for a woman deserted by her husband, and defending an innocent man accused of the commission of a crime. However, most of the cases handled involve nonpayment of wages to poor working people.

1896

The Society changes its name to The Legal Aid Society.

1899

The Society opens its first three branches: the Seamen's Branch, which succeeds in wiping out activities of crimps and in making the kidnapping of sailors a federal offense; the East Side Branch; and the Woman's Branch. (The Woman's Branch is closed in 1902, and an uptown branch at 741 Tenth Avenue is established.) The East Side Branch, which has served immigrants from southern and eastern European countries, now serves a largely Jewish population (88 percent of the clients) who live in the old Tenth Ward of the city.

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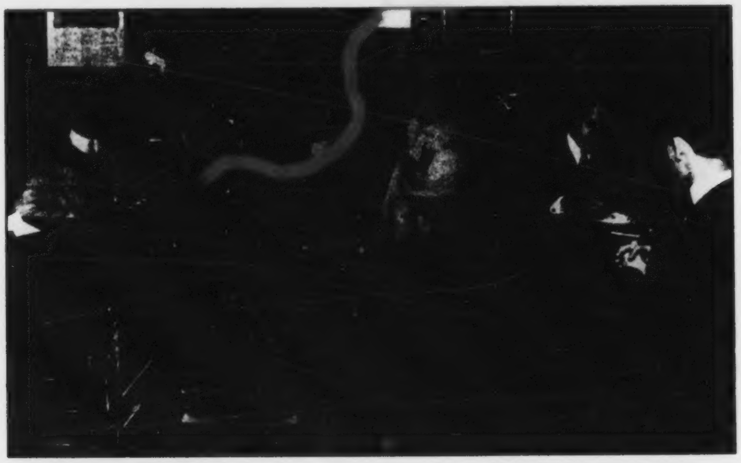
On the Local Scene

Investigate legal services available in your community. You might research the history of the organizations involved as well as the services they provide today. You might wish to contact the organizations, ask for informational brochures, and request an interview. For your interview, you might ask questions such as: Who founded the organization? How has the organization grown? Does it provide help in both civil and criminal services? How many people does the organization serve each year? Does the organization accept all cases, or does it follow any guidelines for accepting cases? If it follows guidelines, what are they?



Early 1900s

The Society opens a Harlem Branch in 1905; a Brooklyn Branch in 1907 (closes in 1909 because of a lack of funds, but reopens in 1910); and the beginnings of a Criminal Branch in 1910 when the Society assigns a lawyer to the Essex Market Police Court.

1911

First National Convention of Legal Aid Societies of America is held in Pittsburgh. Modeled after The Legal Aid Society in New York City, legal aid societies had started in Newark, Boston, Philadelphia, Chicago, Cleveland, Pittsburgh, Rochester (N.Y.), Westchester County (N.Y.), Los Angeles, Kansas City, Cincinnati, St. Louis, Atlanta, San Francisco, and Baltimore.

1917

During World War I, a Volunteer Defenders Committee is organized to represent indigents in felony cases in general sessions in New York County. This effort is underwritten by John D. Rockefeller, Jr., and the attorneys are known as Rockefeller lawyers. In 1920 the committee merges with the Society to become the Criminal Branch. By 1939 a complete merger with the committee takes place, and the Criminal Branch becomes the Criminal Courts Branch of The Legal Aid Society.

1949

The Criminal Courts Branch opens an office in the U.S. Courthouse to provide representation in the district court and in the court of appeals. Again, John D. Rockefeller, Jr., makes the project possible with a generous contribution.

1960s

After the landmark Gideon v. Wainwright decision, the Society is designated as the primary defender in New York City to represent indigents in state and federal courts. The Appeals Bureau argues eight criminal cases before the United States Supreme Court in the 1960s.

The Juvenile Rights Division is established in 1962, concurrently with the creation of the new family court in New York State. It is one of the first organizations to represent children in a juvenile court. The Society provides representation to children accused of the commission of a crime five years before that representation is mandated by the United States Supreme Court in In re Gault. Civil Legal Services are expanded to Queens, Staten Island, and the Bronx with funding through the Office of Economic Opportunity. In 1969 the Civil Appeals Bureau is established.

Maxian v. Brown, 570 N.E. 2d 223 N.Y. (1991), the highest court in New York State, the Court of Appeals, determined that defendants could not generally be held more than 24 hours between the time of their arrest and the time they are first brought before a judge to be arraigned on the criminal charges.

In the state court system, representation in criminal appeals is provided by the Criminal Appeals Bureau. The bureau has played an important role in shaping the criminal law and procedure of New York State and of the nation. Since the 1960s, the bureau has argued 35 cases in the United States Supreme Court, winning 20 of them. The Prisoners' Rights Project, a specialized unit in the bureau, is a leading advocate of constitutional and humane conditions of confinement in the city and state correctional system. The bureau's Parole Revocation Defense Unit, the first in the nation, provides representation and consultation for parolees charged with violations of the conditions of their parole. The Society's Federal Defender Division provides indigent defense representation in the United States District Courts for the Eastern and Southern Districts of New York as well as the Second Circuit Court of Appeals.

Juvenile Representation

The Juvenile Rights Division of the Society was established in 1962 when the Family Court of the State of New York was created. The legislation that created the family court also provided for counsel for children appearing before that court. Thus, the Society was providing representation to children accused of the commission of a crime five years before the United States Supreme Court in *In re Gault*, 387 U.S. 1 (1967), mandated that representation. Today the Juvenile Rights Division provides representation to children in delinquency and designated felony proceedings; child protective proceedings (abuse and neglect); status proceedings (persons in need of supervision); and proceedings involving extension of placement, foster care review, and termination of parental rights. The Juvenile Rights Division has developed a multidisciplinary approach, utilizing lawyer-social worker teams to provide representation to their young clients. While asserting their clients' due-process rights in cases such as *In re Winship*, 397 U.S. 358 (1970), a case brought by the division and decided by the United States Supreme Court (proof beyond a reasonable doubt required in delinquency cases), the division has also been in the forefront of developing case law in the dispositional area. This work has resulted in the rehabilitative purposes of the dispositional phases of cases involving juveniles being given due recognition. In addition to its trial and appellate representation, the Juvenile Rights Division also has a Special Litigation Unit that undertakes law reform efforts focused on systemic problems in the child welfare and juvenile justice systems.

Civil Assistance

From its inception in 1876, the Society has provided civil legal services to the poor in New York City. In the 1960s with federal funding from the Office of Economic Opportunity, the Civil Division was able to open additional offices in Queens, in the Bronx, and on Staten Island.

Today the work of the Civil Division covers a wide range of pressing issues confronting poor people—housing, benefits, family law, immigration, consumer rights, health law, disability, and the problems of the elderly. The division has neighborhood offices in every borough of New York City. Along with neighborhood offices, the division also has specialized units, including the Homeless Family Rights Project; the Civil Appeals and Law Reform Unit; and units addressing immigration issues, family law problems, and problems of the elderly.

In the landmark decision *McCain v. Koch*, 70 N.Y. 2d 109 (1987), in the New York Court of Appeals, the Homeless Rights Project established a basic right to shelter that meets basic standards of habitability. In addition, the Civil Division has also mounted an effort to prevent homelessness by preventing evictions and securing public assistance benefits to enable clients to retain their housing and feed and clothe their families.

The Society also provides civil legal assistance through its Volunteer Division with a full-time staff of experienced attorneys who provide assistance and supervision to nearly 1,000 volunteers from private law firms and corporate law departments in the handling of pro bono cases. The range of cases covered includes housing, benefits, disability, consumer issues, immigration, family law, and AIDS-related legal assistance.

The Civil and Volunteer Divisions provide direct representation to more than 40,000 individuals and families each year. Thousands of additional poor families, senior citizens, and disabled persons benefit from the division's law reform litigation.

Leadership Role

Throughout its almost 120 years of existence, The Legal Aid Society has maintained a national leadership role in providing legal services for the poor. Its full range of services makes it unique in the legal services community. It is the only organization that in one year handles more than 200,000 indigent criminal cases and serves as law guardian to more than 56,000 children, while at the same time representing more than 40,000 individuals, families, and groups in civil matters.

Throughout its history, the Society has drawn its voluntary leadership from the major New York City law firms. From Charles Evans Hughes of Hughes, Hubbard, and Reed to Alexander D. Forger at Milbank, Tweed, Hadley, and McCloy, presidents have come from almost every major firm.

As New York governor Mario Cuomo said when he was presented with the Society's "Servant of Justice" award:

> The Legal Aid Society represents the best our profession has to offer—the very best—in intelligence, rigor and above all, the commitment to use whatever skills one has to serve a cause larger than one's self. A commitment enacted willingly and often at great personal cost. A commitment to make justice flourish here in the occasionally rugged streets of this great city and state. ◆

Center for Law and Education

955 Massachusetts Avenue
Cambridge, MA 02139
617/876-6611 FAX 876-0203

A grantee of the Legal Services Corporation (below), the Center for Law and Education (CLE) "takes a leadership role in improving the quality of public education for low-income students throughout the nation and to enable low-income communities to address their own public education problems effectively." CLE's activities include providing advice and collaboration on cases, publications, training, federal program advocacy, litigation, and assisting parent and student involvement in education. Some of the many school-related concerns CLE addresses are the educational rights of children with disabilities, the federal Chapter 1 program, vocational education, and school-to-work programs.

Children's Defense Fund

25 E Street, NW
Washington, DC 20001
202/628-8787 FAX 662-3540

Created in 1973, the Children's Defense Fund (CDF) is a nonprofit organization supported by foundations, corporations, and individuals. CDF's goal is "to educate the nation about the needs of children and encourage preventive investment in children before they get sick, drop out of school, suffer family breakdown, or get into trouble." CDF activities include public education, research, technical assistance, policy development, and national legislation, with particular attention to the needs of poor children and families. CDF will issue a major report on the costs of child poverty in late 1994.

Legal Services Corporation

750 1st Street, NE, 11th Floor
Washington, DC 20002-4250
202/336-8800 FAX 336-8959

An independent, nonprofit corporation established by Congress in 1974, Legal Services Corporation (LSC) has a mission "to ensure equal justice for people living in poverty through the provision of high-quality legal representation and to further the ends of justice and improve the lives of poor people through the rule of law." This mission is accomplished primarily through funding and oversight of various grantee programs that provide direct services. (Two of the grantees are included in this list.) In 1993, LSC programs helped over 1.5 million individuals and families solve legal problems through advice and referral, brief services, dispute resolution, negotiation and settlement, and litigation. The majority of cases involve family issues, such as custody and protection from family violence, income maintenance for families and the elderly, consumer finance, housing, and juvenile matters.

National Center for Youth Law

114 Sansome Street, Suite 900
San Francisco, CA 94104
415/543-3307 FAX 956-9024

A grantee of the Legal Services Corporation, the National Center for Youth Law (NCYL) has a mission to improve the lives of children living in poverty and to use the law to protect children from the harms poverty causes. NCYL's services include free expert legal advice on youth law matters to legal services attorneys and child advocates; publications, such as the journal *Youth Law News;* and litigation on laws and public policies to improve the conditions in which poor children live—e.g., *Sullivan v. Zebley*, 493 U.S. 521 (1990), to entitle poor, disabled children to receive monthly Supplemental Security Income benefits.

National Clearinghouse for Legal Services

205 W. Monroe, 2nd Floor
Chicago, IL 60606
312/263-3830 FAX 263-3846

Serving as the central repository of national poverty law documents, as well as a disseminator of information to advocates for low-income clients, the National Clearinghouse for Legal Services, Inc., (NCLS) is the communication hub for the legal services community. NCLS services are available to advocates working in legal services programs funded by the Legal Services Corporation and to others working on behalf of low-income people. The NCLS Poverty Law Library, established in 1967, currently houses more than 51,000 cases and publications. Its documents are retrievable at no or low cost through the Legal Records Department. *Clearinghouse Review*, the premier publication of the legal issues affecting low-income people, is sent free to each attorney and paralegal practicing in a legal services program funded by LSC.

National Legal Aid & Defender Association

1625 K Street, NW, Suite 800
Washington, DC 20006-1604
202/452-0620 FAX 872-1031

As a private, nonprofit national-membership organization for local organizations, programs, and individuals that provide civil legal aid and criminal defense services to the poor, the National Legal Aid & Defender Association (NLADA) has two goals: to see that all America's poor people can get legal help when they need it in both civil and criminal proceedings and to ensure that this help is equal in quality to that provided to paying clients. Founded in 1911 by members of the private bar and 15 legal aid offices, NLADA provides training for professionals serving the poor and files amicus briefs at appellate levels on poverty law and indigent defense cases of national importance. NLADA publishes the *Directory of Legal Aid and Defender Offices in the United States and Territories*, a listing of general civil or criminal organizations, whether or not they are members of NLADA.

American Bar Association
541 N. Fairbanks Court
Chicago, IL 60611-3314

SPECIAL COMMITTEE ON
Youth Education for Citizenship
AMERICAN BAR ASSOCIATION

Topics Discussed in the Video

In its history,
The Legal Aid Society of New York

- ✓ Serves immigrants initially, then all indigents
- ✓ Provides assistance in civil law, criminal law, juvenile law
- ✓ Expands in neighborhoods throughout the city
- ✓ Is model for indigent legal services in other cities
- ✓ Has support of major law firms and philanthropists
- ✓ Argues cases in state courts and federal courts

As long as supplies last, copies of the videotape *Equal Justice: The History of The Legal Aid Society* are available through the Office of the Director of Public Information of The Legal Aid Society, 15 Park Row, New York, NY 10038.

McCalpin

F. Wm. McCalpin is a retired partner with Lewis, Rice & Fingersh in St. Louis. He was chair of the ABA Select Committee on the Availability of Legal Services, which was an early effort to muster ABA support for the OEO Office of Legal Services. He has played many leadership roles in improving the delivery of legal services to the poor, including chairing the Legal Services Corporation (LSC) board of directors, which replaced the Office of Legal Services. He is currently a Legal Services Corporation board member. He has been awarded the ABA Medal for distinguished service to the cause of American jurisprudence.

- *Attorneys are provided to poor people in most criminal cases and legal aid is available for civil cases in many places. In your opinion, is the system of providing counsel adequate?*

McCalpin: No. The system is grossly underfunded. The caseloads are horrendous. In death-penalty cases, the resources provided are totally inadequate. The defense does not have the investigatory resources or the access to resources that are available to the prosecution through the police departments.

- *Currently criminal and civil representation is being provided to indigent persons through a variety of means. Would you describe any programs or approaches such as the use of paralegals or simplification of the process to allow for self-representation?*

McCalpin: Most of the states and the federal government have either public-defender or compensated private-attorney systems on the criminal side. I believe that they work imperfectly, but at least some sort of system everywhere in the country now to provide counsel for indigent persons.

I think it is clear that paralegals will play an increasingly important role in the provision of legal services. We are moving slowly in the direction of paralegals providing services independent of lawyers. In some Legal Service Programs, paralegals appear for clients in some administrative proceedings. As you may know, the ABA is undertaking a study on nonlawyer practice in the United States, and it is finding that such practice is far more extensive than has generally been appreciated.

Additionally, many Legal Services Programs are holding pro se clinics teaching people to represent themselves. Many legal procedures are too complicated even for lawyers; and if they can be simplified so that persons can represent themselves more adequately, they ought to be. Many more persons are representing themselves. In some states many of the domestic-relation matters are pro se.

- *Do you believe lawyers as a group have a special obligation to provide counsel, and what do you believe is the best method for providing legal representation?*

McCalpin: It is perfectly clear to me that the legal profession by itself cannot bear the whole burden of providing representation. There are not enough lawyers, and the burden is too great. It is true that in many areas lawyers have to be the service providers, but that does not mean they have to provide the services at the cost of impoverishing themselves. It has to be a coordinated effort of the community with lawyers at the forefront making some contribution.

There is no best way to provide legal representation. It will take a combination of paid staff lawyers, lawyers working on contract, and pro bono activities to begin to meet the challenge of providing adequate representation.

- *Should the right to counsel that exists in criminal law be expanded into other areas of the law? Should special efforts be made to provide counsel for juveniles?*

McCalpin: Yes, but I do not think it should be expanded on a constitutional basis. To the extent that we are going to expand representation, it ought to be by legislation so that the various pros and cons can be thrashed out. I think it is something that has to be worked out in the political process and not mandated by constitutional fiat.

With regard to juveniles, I think that access to counsel depends upon whether the minor is the subject of the action, as is likely to be the case in a juvenile matter in which representation is needed. In divorce or custody cases, I am not certain minors need to be represented separately from the parents. The *In re Gault* case requires representation in juvenile delinquency cases and this representation is important.

- *One of the goals of the legal system is equal justice for all. What does the phrase mean to you in the context of the right to legal representation?*

McCalpin: It's a combination of two things. It means everybody has access to the legal system; and when people are involved with the system, everybody is treated objectively, fairly, and equally without regard to race, wealth, or social status. I think it's equal access plus equal treatment within the system.

Murray

Archibald R. Murray is Executive Director and Attorney-in-Chief of The Legal Aid Society in New York City, and he was the first commissioner of the Division of Criminal Justice Services. He has been active in both civil legal services and criminal indigent defense. Mr. Murray is the immediate past-president of the New York State Bar Association. His contributions to the legal system in New York City, his dedication to public interest, and his commitment to the rights of the poor have been recognized by various organizations and bar associations, including the Fordham Law Alumni Association Medal of Achievement.

- *Attorneys are provided to poor people in most criminal cases and legal aid is available for civil cases in many places. In your opinion, is the system of providing counsel adequate?*

Murray: In some jurisdictions, but by no means all, there are reasonably adequate systems for providing counsel to indigent criminal defendants. I am unaware of any jurisdiction of significant size that can be said to have a satisfactory system for meeting the civil legal needs of the poor.

- *Currently criminal and civil representation is being provided to indigent persons through a variety of means. Would you describe any programs or approaches such as the use of paralegals or simplification of the process to allow for self-representation?*

Murray: Paralegals who have been properly trained to perform particular tasks can be effective instruments for extending the lawyer's capacity to serve clients. These tasks may involve real-estate transactions, some aspects of matrimonials, and certain administrative hearings, as well as litigation support of various types.

Where the procedure can be simplified without damaging the relative rights of the parties and the parties are reasonably matched, it would not be inappropriate to proceed without counsel. If one side engages counsel, the other will also need counsel. This effort at simplification deserves closer examination and evaluation.

- *Do you believe lawyers as a group have a special obligation to provide counsel, and what do you believe is the best method for providing legal representation?*

Murray: Lawyers as a group do not have an obligation to guarantee the adequacy of representation. However, because of their standing as an independent profession and their exclusive right to practice law, lawyers have a duty to assist in making legal services available to those who need service but cannot pay. Lawyers also have a duty to act competently and to encourage high standards.

Since the provision of criminal defense to the indigent is a government responsibility, private resources should not be diverted to meet this government obligation. Whatever resources, governmental or nongovernmental, that can be brought together should be channeled to the provision of civil legal services—an area in which there is no constitutionally mandated right to assistance of counsel.

- *Should the right to counsel that exists in criminal law be expanded into other areas of the law? Should special efforts be made to provide counsel for juveniles?*

Murray: Yes. There are circumstances in which the claim can be every bit as critical to the party as his or her liberty. Loss of one's home or deprivation of significant government benefits that are needed for survival are but two such examples.

Yes [there should be special efforts to provide counsel for minors]. New York now provides counsel to minors in many of these cases. For more than five years before *In re Gault* was decided, New York, by statute, provided representation at government expense for children who were charged with delinquency, were alleged to be in need of supervision, or were the subject of child protective hearings.

- *One of the goals of the legal system is equal justice for all. What does the phrase mean to you in the context of the right to legal representation?*

Murray: Equal justice as it relates to legal representation requires provision of counsel in criminal cases in which the defendant is unable to afford counsel. In civil cases it requires provision of counsel if the party has a serious, reasonable claim or defense that requires the assistance of a lawyer for effective presentation, and the party is unable to afford or otherwise secure the assistance of a lawyer. The bar should resist the temptation to "ration justice" in these cases.

Neuhard

James R. Neuhard is director, State Appellate Defender Office in Detroit, Michigan. A leader in justice system reform efforts, he is past president of the National Legal Aid and Defender Association and Chair of the ABA Special Committee on Funding the Justice System. The latter is charged with the highest priority of the ABA to investigate and attack the systemwide crisis in funding for all aspects of the justice system—civil and criminal. Mr. Neuhard is past president and current secretary of the Criminal Defense Attorneys of Michigan.

• *Attorneys are provided to poor people in most criminal cases and legal aid is available for civil cases in many places. In your opinion, is the system of providing counsel adequate?*
Neuhard: No, now do you have a year? [In brief, there is not adequate funding to assure assigned counsel a reasonable fee for the work they are doing]. A reasonable fee would pay the lawyers overhead and a modest sum on top of that. Separately the lawyers' expenses—costs for expert witnesses, travel expenses, and other out-of-pocket expenses—should be covered.

On the defenders' side, the most important goal should be realistic caseloads. Secondarily, there should be parity with prosecutors in terms of salary, which very few defenders have.

The two together [caseload and low salary] are cancerous in terms of their impact on the quality of representation. Finally, the support services ought to be there. Right now the scales are almost totally tipped, unless you are a well-funded defender program.

• *Currently criminal and civil representation is being provided to indigent persons through a variety of means. Would you describe any programs or approaches such as the use of paralegals or simplification of the process to allow for self-representation?*
Neuhard: [Given a choice between pro bono efforts and publicly funded attorneys] I fundamentally and profoundly oppose pro bono efforts when it is a Sixth Amendment mandate of the state to provide counsel.

I think the word *paralegal* hasn't as yet come to an accepted meaning. It is one of those terms that in the minds of people has its own meaning. If you mean a trained support person who has the ability to provide virtually any aspect of what a lawyer does other than going into the court, I think that use of paralegals is growing tremendously. We will probably be, at some point, certifying a nonlawyer subclass who can provide many, if not all, of the services lawyers can provide. There is no reason for that not to occur over time.

There are an enormous number of situations in which people would be just as happy to represent themselves if they thought they could do a decent job. I believe that you should have access to counsel if you want it. But I think even if counsel were available, many people would choose to do it themselves if they felt they could do it as well or better.

• *Do you believe lawyers as a group have a special obligation to provide counsel, and what do you believe is the best method for providing legal representation?*
Neuhard: The bar, as long as it has a monopoly, the exclusive right to provide representation in this area, has responsibility in terms of insuring that the lawyers are carrying out their mandated tasks professionally, both in the civil area and the criminal area. But that doesn't translate to say that the bar then must provide services free of charge. We continue with this concept that somehow lawyers who do this work should be paid below the market rate or forego pay entirely. No other licensed professionals who provide services to the state provide similar pro bono work. They get paid at the market rate. So why is it that the bar has to be paid at some artificially low rate? What it breeds is exactly what we see— turnover, inexperience, lack of resources, poor representation, and a complete cynicism on the part of the people who are receiving the services because they know what they are getting.

I believe in a mixed system [of meeting legal needs]. There ought to be a healthy mixed system with the private bar and a public defender or a not-for-profit corporation providing the services. Contracts can also be used, provided the attorneys are competent. A variety of mechanisms should be used—because [they are] more flexible, more adaptable, and more responsive to changing caseloads, emergencies, and short funding—provided the understanding is that a reasonable fee is paid to the private lawyer and that reasonable caseloads exist for the defender.

• *Should the right to counsel that exists in criminal law be expanded into other areas of the law? Should special efforts be made to provide counsel for juveniles?*
Neuhard: Of course [counsel should be expanded]. In the criminal area we almost have universal coverage. The Court has said time and again in the criminal area that the constitu-

tional rights possessed by a person aren't meaningful without the Sixth Amendment right to counsel, and I think that is also true in the civil area. The time has come to recognize that our society runs very much on access to courts. And the time has come to recognize that it is a fundamental right to have counsel in order for access to the courts to have any meaning at all.

The rights of a juvenile are no more or less important than the rights of any other citizen. What confounds this fact, obviously, is that minors have a parent or a guardian [legally] responsible for them who also has the power to make decisions on their behalf. If we give a lawyer to the parent and a lawyer to the child, we create a very interesting situation. But even though children have fewer rights, they have no less right to be counseled on what their rights are. All the parties should be counseled on what their rights are, even if in some situations, the guardian has the right to overrule a minor's decision.

• *One of the goals of the legal system is equal justice for all. What does the phrase mean to you in the context of the right to legal representation?*

Neuhard: Four aspects come to mind immediately when I think of equal justice for all. The first is just simply access to a court, access to a meaningful dispute-resolution process that leaves people feeling they received a fair hearing. Two, people want to perceive that the judgment that they are receiving is fair, learned, and reflective. Third is the quality of the process itself. People want a process that is public and treats everyone the same. Fourth is access to competent counsel, not just a warm body, but a lawyer who is skilled, competent, and not overburdened.

Smith

Wm. Reece Smith, Jr., is a partner at Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P. A., in Tampa, Florida. As president of the American Bar Association, he spearheaded the nation's commitment to providing free civil legal services to poor persons and was instrumental in the creation of the ABA Private Bar Involvement project, which became the ABA Center for Pro Bono. He led "the march on Washington" of legal profession leaders on behalf of the Legal Services Corporation in the 1980s. Mr. Smith is a recipient of the ABA Pro Bono Publico Award and the ABA Medal for distinguished service to the cause of American jurisprudence.

• *Attorneys are provided to poor people in most criminal cases and legal aid is available for civil cases in many places. In your opinion, is the system of providing counsel adequate?*

Smith: I think the system is not only adequate, but excellent. I think the funding for the system is not adequate. More money is needed both in the criminal justice area for public defenders and in the civil area for the Legal Services Corporation. Bar association programs as well could use additional funding. The system is effective, although I am certain there is plenty of room for improvement. For example, we need more private lawyers actively committed to and involved in the pro bono movement.

• *Currently criminal and civil representation is being provided to indigent persons through a variety of means. Would you describe any programs or approaches such as the use of paralegals or simplification of the process to allow for self-representation?*

Smith: There are any number of provisions whereby state governments and the public and private sectors provide counsel. For example, in the criminal justice area in the state of Florida, there is some governmental funding for the representation of persons on death row. By the same token, there is not enough funding to meet all the needs that exist, and accordingly the voluntary bar, without compensation, also seeks to meet those needs. To address the civil legal needs of the poor, there are the federally funded civil legal services programs conducted through the auspices of the Legal Services Corporation on the one hand and the tremendous pro bono effort by the private bar on the other. Nationwide in the last ten years, the voluntary programs have gone from 50 in number to about 950.

I think paralegals can be used effectively in many ways to insure representation. There was a time, twenty years ago, when some of the professional poverty lawyers were very much opposed to the use of paralegals because they perceived it as providing second-class justice for the poor. I think experience has prompted us to modify our views in that regard, and we all recognize now that there are a variety of areas where paralegals can serve effectively.

I think it is fine to simplify, but that has long been suggested and hasn't been terribly efficacious. There is now a good deal of emphasis being put through the auspices of the bar association on self-help. I think to a certain extent those developments are desirable. They can only go so far, however, before expertise inevitably is needed.

- *Do you believe lawyers as a group have a special obligation to provide counsel, and what do you believe is the best method for providing legal representation?*

Smith: I regard justice as not just lawyers' business, but everybody's business, and accordingly I think a certain amount of each tax dollar should be addressed to providing representation for persons who need legal services and can't afford them. Substantial monies are provided in most states for public defenders in the criminal justice area. In the civil area, there are a great many lawyers involved in the pro bono movement. At least one estimate suggests that a third of the private practitioners in this country are providing civil legal services voluntarily without compensation. I don't know of any other business or profession that can make an equal claim. I think the legal profession does have a special obligation because we have a responsibility to insure that the legal system works appropriately. As professional persons we are committed to the concept of service—making our services available to all in need of legal services regardless of ability to pay. That does not mean that the legal profession alone should bear the responsibility of providing adequate representation.

By far the best way to insure representation is through the combination of public and private efforts that exists in this country today. There will never be enough tax money to meet all the legal needs, so those needs must be supplemented through the voluntary efforts of the private bar. I think the two working together is by far the most effective way to approach the matter and to provide the world's best system of legal assistance for the poor.

- *Should the right to counsel that exists in criminal law be expanded into other areas of the law? Should special efforts be made to provide counsel for juveniles?*

Smith: If *expanded* means providing lawyers at government expense, then I think that our nation cannot afford nor is it realistic for us to expect that every person who is in need of legal services in this country and is unable to pay for them will be provided all of those services at government expense. I just think that is not going to happen regardless of how desirable it is. The best way to meet the specific legal needs of the poor is to combine governmental funding and the voluntary, uncompensated efforts of the private bar as we do now. We should expand both government funding for civil legal assistance and volunteer work. I don't think we can hope for the kind of pervasive funding in the civil area that exists in the criminal area.

There should be special efforts to expand representation for minors, and special efforts are being made. There are any number of guardian *ad litem* programs conducted by bar associations throughout the country. Representation of persons who can't afford lawyers in divorce and child-custody cases is equally important and is one of the biggest problems that we face. The federally funded programs don't have the resources to meet all of the needs in the area of domestic relations. The private bar seeks to supplement the efforts of the federally funded programs, but this is one of the most challenging areas.

- *One of the goals of the legal system is equal justice for all. What does the phrase mean to you in the context of the right to legal representation?*

Smith: Equal justice for all is a national ideal; it appears on the facade of the Supreme Court building. It is a goal to which our nation and the legal profession should aspire. It means we should seek to make our nation's political system and legal system work so that each citizen is able to enjoy the full measure of his or her rights.

Photo credits: p. 31 IU Instructional Support Services, p. 32 ABAJ/Jim Caccavo, p. 36 ABAJ/Dennis Osborne

Vignettes

. . . from lives devoted to serving the poor

In a world where most people want to earn top dollar in the marketplace, some legal professionals seek other rewards. Here's a look at just a few of the hundreds of thousands of attorneys who represent the poor all around our nation. The pay is low, much is done for free, and the media aren't interested. But what a story of service these attorneys have to tell!

The man in his 30s was not known for violence—he had quit his job as a New York police officer because he did not like to carry a gun.

After he left the Police Department, he became a sanitation worker, living from paycheck to paycheck. He had no savings, no bank account—no assets. He became addicted to illegal drugs. One night, he argued with a crack user who routinely threatened others and stole to support his own drug habit.

During the scuffle, the crack addict was stabbed to death. The former police officer was charged with manslaughter.

"I thought that my client was defending himself in the fight," says his public defender Daniel J. O'Donnell. "He was in a bad place at a bad time, doing things that put him at risk. But he was not somebody who deserved to go to prison."

The man spent eight or nine months in jail awaiting trial. The jury took less than an hour to acquit him. He collapsed when he heard the verdict.

"He walked out into the arms of his daughter and mother, returned to work, and has not been in trouble since," says O'Donnell.

Monica Whitaker and Mary Feely are free-lance editors in Chicago.

Daniel J. O'Donnell

In a world of cops-and-robbers action, murders, and drugs, Daniel J. O'Donnell is content to stick to the paper trail.

O'Donnell, a public defender with The Legal Aid Society in Brooklyn, New York, deals with routine felonies—car theft, large-volume drug sales, murder—on a daily basis.

"I use my four years of college and three years of law school to help desperate people that our society has disinherited," says O'Donnell. "By the time they get to me and to the criminal justice system, the schools, welfare—everything else has failed them.

"When I was a kid, I saw that lawyers had power. The Watergate era impressed me. I remember the [lawyers] cross-examining people from the White House," people who ran the country. With patience and hundreds of hours of document research, those lawyers held the powerful accountable.

"So today I spend my time fighting for people who have done horrible things, sometimes because of misjudgment, many times because of drugs," says O'Donnell.

"This work sucks the blood out of your veins. But I help explain how my clients got where they are. Sometimes they are savable."

The lawyer says he shied away from schoolwork and dismissed the legal field in general until 1984, when he worked on Gary Hart's presidential campaign.

"Everyone in the campaign whose job I wanted was a lawyer," he recalls.

Today, with seven years of service under his belt, O'Donnell stresses that he has never been a straight-A student and encourages others who may not have good grades to stick to their goals.

"Clients have told me that I'm the first person who ever fought for and believed in them. What I do is a noble thing. It couldn't be more noble."

Daniel J. O'Donnell is a senior staff attorney with The Legal Aid Society in New York City. He is assigned to the Brooklyn Office of the Criminal Defense Division.

by Monica Whitaker and Mary Feely

Tina Shanahan

The woman sunken against the sheets of her hospital bed is troubled and dying. AIDS has ravaged her body. Her four children, each fathered by a different man, have nowhere to go. The eldest has run away from home.

"It's sad to see her in the last stages of the disease," says law student Tina Shanahan, an intern at the clinical law office handling the woman's case and the custody of her children. "It's pretty challenging going to the hospital and not being able to tell whether she's coherent enough to sign documents."

Shanahan, who is working toward a joint law degree and master's degree in social work, deals primarily with troubled families and many clients affected by HIV at the University of Maryland Law School in Baltimore.

Once a childhood development specialist, Shanahan says she decided to pursue public interest law after becoming frustrated with problems in the classroom.

Most of the children with problems in school were suffering from "system problems," she explains. "It wasn't something we could fix."

Now, after just one year in law school, Shanahan says she is excited at the prospect of working to help others with her legal knowledge. She encourages other students, whether already in law school or interested in attending, to perform public service.

"While it is important to be a good student if you want to go to law school, you also need to do things that are productive, and have so many different types of experiences," she points out.

"Get to know people in the legal community so they can see that you care about your clients. Law schools are looking for caring people—they are impressed by students who have done lots of public service work, such as internships."

Tina Shanahan is enrolled in the Clinical Law Program at the University of Maryland School of Law in Baltimore.

Doug Robinson

It was a grisly tale for the headlines. An elderly El Paso couple were found bound and hacked to death with a machete in what apparently began as a burglary.

The police fingered 29-year-old Frederico Macias, a poor member of an ethnic minority. He was tried, convicted of murder, and sentenced to die.

"A lot of people have the knee-jerk reaction that the people on death row are guilty and deserve what they got," says Doug Robinson, who took on Macias's case as a volunteer in 1988. He and his law-firm colleagues spent five years and thousands of hours researching the case.

ABA/LISA BERG

When 67-year-old Lenore returned home after cancer surgery, she found an empty mailbox. Her Social Security check, her sole source of income, had been lost or stolen.

Because she could not pay her rent, Lenore was locked out of the room in the New York residential hotel where she had lived for 20 years. She found shelter in a friend's room but could get no help from either her landlord or the Social Security Administration.

She called the local legal services office. A lawyer informed her landlord that the lockout was illegal and would result in legal action. The landlord immediately allowed Lenore to return home.

The lawyer got the Social Security Administration to trace Lenore's missing check and provide emergency assistance in the meantime. This allowed Lenore to buy food and pay her rent.

On the basis of what they learned, the Washington lawyer convinced the federal courts to reverse the conviction by proving that Macias's original trial lawyer was ineffective.

The original lawyer had overlooked an alibi witness who could vouch for Macias's whereabouts at the time of the murder, and witnesses who could refute the testimony of a nine-year-old girl who said she saw the defendant with blood on his shirt and hands on the day of the crime. Macias's constitutional right to a fair trial had been violated.

Robinson, who began the case as a volunteer with the American Bar Association's death-penalty project, says his experiences only deepened his resolve against capital punishment.

"This is an issue that defines who we are as a civilization," he says. "... I'm convinced that the death penalty goes disproportionately to minorities and people of little means. The more I've been into it, the more I've seen that the system of justice is just not precise. There's too much opportunity for error, and with the death penalty, it's an error that can't be corrected."

Douglas G. Robinson is a partner at Skadden, Arps, Slate, Meagher, & Flom in Washington, D.C. He received a 1994 ABA Pro Bono Publico Award for his work on this and other cases.

Ed Kelaher

As chairman of a ministry to help the poor, Ed Kelaher sees himself as more than a lawyer running a free legal clinic.

Every day, Kelaher is ambassador, counselor, and friend to many of the "invisible people" behind the scenes of Myrtle Beach, S.C. His clients are the workers who clear trash from the beaches before dawn, bus tables, and change sheets in the hotels.

"Most people who can't afford to go to a lawyer, go to one only with their most pressing needs. I get people in jail without any real justice, victims of insurance frauds and civil-rights violations," says Kelaher.

The Surfside Beach, S.C., lawyer has helped his partner, Gene Connell, battle local authorities and employers. Recently they settled a class-action lawsuit against the state of South Carolina for wrongfully taxing the pensions of more than 61,000 people. After five years of legal dueling and two U.S. Supreme Court appearances, the complainants settled for $100 million.

Despite their firm's newfound reputation as the David that slew the state Goliath, Kelaher says he plans to stick to day-to-day advising and legal services. For the poor and underprivileged, it is a rare chance for the law to make a good impression.

"If you're willing to deal with the basic working person who makes money for food, you have the opportunity to be part of something real," he says. "... When you reach out and touch people's lives, it comes back to you."

Edward T. Kelaher is a partner at Kelaher & Connell in Surfside Beach, S.C. He was the recipient of a 1993 ABA Pro Bono Publico Award.

When Edward T. Kelaher walked through the South Carolina court, a judge told him a man facing drug and murder charges needed a lawyer.

"I went to see the man in jail, expecting a scar-faced monster who deals drugs and kills people," says Kelaher. "Instead, a small, scared man who was shivering under a blanket came to the glass window.

"He was crying, pleading for me to help him, and thanking me for coming."

Kelaher learned that his client was suffering from AIDS and had two or three months to live. Because of the client's illness, other prisoners were beating him.

"He was not a murderer," says Kelaher. "He was doing lookout work for drug dealers so that he could get the drugs that made him feel better."

Kelaher and the prosecutor explained the client's situation to the judge, who ordered his transfer to a hospital. He was later discharged and died soon afterward.

"That was one time when something in the criminal court system turned around and the compassion and humanity of the law came through," says Kelaher.

Barbara Baxter

When Barbara Baxter graduated from the West Virginia University College of Law in 1982, she wasn't planning a career of public service.

She joined a large law firm, where she was one of several lawyers appointed by the state supreme court to represent prisoners in a maximum security prison.

"The prison dated back to the Civil War and was horrifying," Baxter says. "It wasn't safe for guards and it wasn't safe for prisoners."

Baxter and her colleagues eventually convinced the West Virginia Supreme Court that such conditions were unconstitutional. The court ordered the prison closed, and a new 1,250-bed facility is now under construction.

While working on that case, Baxter realized she enjoyed public service. She left the law firm, set up her own practice, and five years ago joined West Virginia Legal Services Plan, Inc.

Today she represents people living in five rural counties of Appalachia.

"I think I am making a difference in what I do," she says. "Maybe not as big a difference as someone like Martin Luther King, but I am making justice work for people. That's a good feeling."

Many of Baxter's clients are women who have been abused. She helps them obtain domestic-violence orders, which are protective orders in West Virginia, and represents them if they seek divorce.

She also represents people who have been refused Supplemental Security Income (SSI), a welfare program for poor people who are physically or mentally disabled. Baxter's clients, many of them veterans or homeless people, often suffer psychiatric disabilities.

"This region has one of the lowest SSI approval rates in the country," she says. "Most people who apply get turned down. One of my clients had been in a psychiatric institution for a year and still was turned down."

Almost every appeal Baxter has filed has ended in victory for her client.

West Virginia Legal Services Plan, Inc., handles a wide variety of cases on such topics as welfare and housing. Recently, the agency filed a lawsuit demanding greater enforcement of child-support orders.

"We have a lot of work," Baxter says. "In fact, we turn away two out of three people who are financially qualified to receive our services."

Having to turn away clients is one of the frustrations of the job for Baxter, along with the low pay.

Her greatest satisfaction comes from knowing she has helped her clients.

"It's not like people come back and thank you," she explains. "I don't expect them to. But I represented a homeless man who was sleeping under a bridge. I helped him get $446 a month in SSI, so now he can afford a place to live and food to eat. That makes me feel good."

Barbara Baxter is a staff attorney with West Virginia Legal Services Plan, Inc., in Wheeling and president of the West Virginia State Bar. She is the state bar's first female president.

Married at the age of 16, Roberta was abused by her husband during most of their marriage. During her third pregnancy, she suffered a miscarriage as a result of a beating.

She obtained a court protective order (telling her husband to stay away from her), but the police did not enforce it. When Roberta left her husband, he broke into her new home and stabbed her.

She then tried to obtain a new protective order, but the court gave her a support order by mistake. The police refused to help when Roberta's husband broke into her home and beat her.

Roberta contacted the South Brooklyn Legal Services Office. Her lawyer helped her get a divorce, arranged for her to move to a new apartment, and obtained moving expenses from the Welfare Department.

Today, Roberta has graduated from college and runs a hotline for battered women.

Luis Galvan

Born in Mexico and raised on the Southeast Side of Chicago in a steel-mill district that is largely Hispanic, Luis Galvan didn't have to go far to find people in need of legal assistance.

"The biggest thrill you have in this job is to be able to have an impact on someone's life," says Galvan, an attorney with the Federal Defender Program.

Galvan's ties to his community and "concern about the rights of people in a legal setting" spurred him to complete a law degree at DePaul University. After graduation from the university's law school, he began work with the Defender Program and a free legal clinic that operates in a local church one evening a week.

As a federal defender, Galvan represents his clients through every stage of the legal process. He will represent a client at initial hearings, through a trial, and in appeals—all the way to the U.S. Supreme Court if need be.

On a typical day, he spends the morning and part of the afternoon in court. He visits clients in jail and usually has time in the afternoon to write legal motions. Overcoming clients' problems becomes a personal challenge, he says. Many bring disappointments, but the few bright spots seem to make it all worthwhile.

"About 40 percent of this job is social work," Galvan says. "We have to get people into alcohol and drug programs and develop sentencing alternatives."

Because the workload is reasonable and because he may spend years representing a client, Galvan often develops a close rapport with clients and their families.

"We try to address the social ills that caused our clients to come through the federal justice system. By and large, we can do a good job for the people who are willing to accept our advice and get the counseling and other services they need.

"We have a lot of failures, but we also have a lot of success stories. It's great to have people call you years later and tell you how well they're doing."

Luis Galvan is the supervisor of the Federal Defender Program in Chicago.

Distraught after an argument with his wife, the Chicago man phoned a bank. He said he had a bomb and was going to rob the bank.

When he arrived at the bank, Federal Bureau of Investigation agents were waiting. He gave himself up and was arrested.

"He wasn't intending to rob the bank," explains his public defender Luis Galvan. "He wanted to get arrested because his wife had thrown him out and he had nowhere else to go."

Because of those circumstances, the man received a shorter sentence than usual for bank robbery. He entered a drug detoxification program while in prison.

"He keeps in contact," says Galvan. "He's working, he's overcome his drug habit, and he's doing real well."

Claudia Smith

Each year, forced from their homes by poverty and a lack of work in Mexico and Central America, thousands of indigenous workers cross the American border looking for jobs in the California orchards.

Instead of opportunity, they find farmers trying to cheat them out of wages, cities passing ordinances against them, and smatterings of hate crimes that increase with the harvest season.

Many of the migrants from Central America are fleeing civil war. They speak pre-Columbian languages and are wary of outsiders. Recent Mexican migrants also are indigenous people. This means they face many cultural and linguistic barriers in this country.

"These people are marginalized and vulnerable," says Claudia Smith, a lawyer with California Rural Legal Assistance, which offers free legal representation to the migrant workers. Smith was born in Guatemala and moved to the United States to attend George Washington University. Her legal studies at the University of San Diego, she says, were simply a means to an end.

"I don't particularly enjoy being a lawyer. To me, the law is just a tool. I wanted to work with farm workers, and being a lawyer was an effective way to do it."

In the past, Smith and her colleagues have battled cities trying to ban sidewalk hiring of workers by employers who pay their workers less than minimum wage. They have pressured law-enforcement officers to investigate and prosecute hate crimes.

"We have dramas played out all day, " Smith says. "Just to see the courage of my clients in the face of all odds, I'm in awe of their strength of character and their strength all around."

Claudia E. Smith is regional counsel with California Rural Legal Assistance, Oceanside Office.

James Bell

Justice, according to James Bell, requires "inhuman vigilance."

He should know. As a staff attorney at the Youth Law Center in San Francisco, Bell tracks public policies across the nation that affect people under 18.

"Right now caning is an issue," he says. "Several pieces of legislation being discussed in California would introduce caning in courtrooms. And if one legislature discusses caning, everyone wants to do it." Bell is dismissive of such measures, which he says make people feel better but do not to address the root causes of crime.

ABA/CARL LEBOEUF

"We say that this isn't right, and we talk about the implications of such policies," he explains. "We hope to get some judgment into the picture, to slow people down and to open up dialogue."

Bell's clients are poor, under the age of 18, and living in government care or custody. He attributes hardening attitudes against young people, including young offenders, to a "low-level terror."

"Jobs pay $5 an hour, but it takes $10 to live," he says. "Government can't provide the things people need for a decent life, and no one knows what to do about that. That creates desperation and policies like 'three strikes you're out.'

"Our response to a social problem is not to deal with it, but to criminalize it. We have more people locked up in this country than any other country in the world, and nobody feels safer." Bell says a frustration of his job is that "you never win."

"You win something, and somebody goes and finds a loophole," he says. "You think you've solved something, and three years later you start from scratch. Even when you win, you don't win."

Bell is proud of his many legal challenges to the practice of holding children in adult jails, which he calls "abhorrent." Another source of pride was an invitation to South Africa, extended by the African National Congress, to advise the country on juvenile justice law. "That was the highlight of my professional career," says Bell, who will return to South Africa next year.

James Bell is a staff attorney at the Youth Law Center in San Francisco. He received the ABA Juvenile Justice Committee Award in 1994.

Almost 100 families lived in a trailer park in Soledad, California. Most of the residents were poor farm workers.

Floods were frequent at the trailer park. Because there was no barrier between the trailer park and a nearby freeway, cars could run off the road and into the trailers. The trailer park had no playground, and its garbage collection was unsanitary. Yet rents were rising by about 30 percent a year.

California Rural Legal Assistance filed a complaint on behalf of the residents, claiming the trailer park violated health and safety codes. The landlord was forbidden to raise rents until the case was settled.

The farm workers were anxious to slow the rent increases. The landlord rejected a rent-control proposal. The tenants then turned to the Rural Community Assistance Corporation, which helped them obtain grants and loans.

The residents used the money to buy the trailer park, renovate it, and run it as a cooperative.

Teaching Strategy

You Be the Judge

Joseph L. Daly

Background

Definitions of justice are elusive. This teaching strategy introduces students to two legal philosophies involving the concept of justice: the Traditionalist Western view based on Greek philosophy and the more recent Critical Legal Studies (CLS) view.

Besides showing students how to distinguish between these two views, this strategy will help them discover how attorneys might prepare to argue before each type of judge and what impact there might be on the verdict if the defendant, in this case a homeless person, does not have access to legal representation.

Objectives

1. Contrast the Traditional Western and Critical Legal Studies philosophies of law
2. Consider whether universal concepts of "justice" and "natural law" exist, and how justice might be embedded in law
3. Prepare legal arguments based on Traditionalist and CLS judicial philosophies
4. Evaluate the impact of legal representation on a verdict
5. Determine the significance of the philosophies judges might hold

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Joseph L. Daly is a professor of law at Hamline University Law School in St. Paul, Minnesota. The teaching strategy is adapted from his writings, "Justice and Judges," Brigham Young University Law Review *2 (1988): 363, and "You Be the Judge: Apply Your Concept of Justice to This Difficult Case" (Hamline University, 1994).*

Target Group: Students in grades 10–12

Time Needed: 4–5 class periods

Materials Needed: Student Handouts 1 and 2 for each student; courtroom props

Procedures

1. Assign the class to read Student Handout 1 and be prepared to discuss the questions in the ending paragraph.
2. Debrief after students have read Handout 1.
   a. Ask for volunteers to try to answer the questions at the end of the handout, and to share the just laws they wrote.
   b. Now take a vote. Was the theft of food by the homeless people excusable on moral grounds? Should the family have turned the homeless in to begin with? Should the homeless be put in prison for life? If not, is another punishment appropriate? What should be done?
   c. Ask students to take a position. Is justice unachievable here? Is there such a thing as justice if it cannot be achieved here? Do they believe, with the CLS philosophers, that we have no universal concept of justice? Or do they agree with the traditionalists that a universal law governs us?
3. Have students read Handout 2 and set up the trial as instructed.
4. Tell students that, before the state of Frustration had a law stating everyone was entitled to a lawyer, defendants often had to present their own cases before the judges. Have the student chosen to be the defendant present his or her case before both panels at the same time. Tell the panel members that they are to decide the fate of the defendant based on the law and the philosophy held by their panel. Have the judges write their decision and seal it in an envelope for later review.
5. Conduct the second trial with attorneys before the traditionalist panel of judges.
6. When the trial has been completed, debrief.
   a. What were the facts of the case?
   b. What were the arguments for each side? Which arguments were the more compelling?
7. Repeat procedures 5–6, but for a trial before the CLS panel.
8. Discuss with the class whether it is important for attorneys to know whether a court has an overriding judicial philosophy.
9. Discuss whether different judicial philosophies can lead to the same or different verdicts. Can the philosophy of law and justice be important when determining who should be judges?
10. Have the judges reveal their decisions for the defendant's fate when defense attorneys were not used. Discuss the following questions. Was the verdict different when the case was tried without attorneys? If so, why? What advantages are there to being represented in court by someone who knows the law? What advantages are there in being represented by attorneys who know the different philosophies of law? Then have students discuss why having access to legal counsel is an important right for every defendant.

Student Handout 1

Justice and Legal Theory

Modern American legal philosophy struggles with the question of how to achieve justice through the law. What is a just law? How do we formulate a just law? How can we interpret existing laws justly? These questions are interwoven throughout the development of modern legal philosophy.

Traditionalist Western View

Traditionalist Western legal philosophers link law with morality. They talk about justice as a universal idea—one that applies to us all, and one that we all understand. They say that, if we think deeply about justice, we can compare society's laws with it, and see whether justice is being served or violated by each law. If a law violates justice, then we can change it. But law, at the same time, can be just.

For example, if a law makes slavery legal, and we compare this law with the concept of justice, we can see that slavery is unfair and that it violates "natural law"—the greater law that binds us all. Once we recognize this, we will overturn the unjust law, as Americans did when they overturned laws that allowed slavery in the United States.

A traditionalist would say that an unfair law is really no law at all—that it is invalid because it is immoral. An example of an invalid law might be one that calls for the imprisonment of any homeless person because that person is poor. If this person appeared before a traditionalist judge, the judge might not want to enforce the law on moral grounds and might seek a way not to, perhaps by reinterpreting the law or even by resigning on moral grounds.

Yet, traditionalists maintain that we must work within, not outside, the law's established framework. That is, we must respect existing law even as we seek to change it. Because of our concept of justice, we can succeed.

Critical Legal Studies View

An irony in the Traditionalist Western view is precisely that unfair laws are created and permitted to exist, regardless of any universal concept of justice people might have. (It took a civil war to end slavery in the United States.) Critical Legal Studies (CLS) philosophers say this is because of the conflict between what is really fair and what those in power want to be "fair." In the case of slavery, slave owners wanted to keep their slaves (property) in part because losing them meant losing a great part of their wealth.

As with slavery, the law is often corrupted by the desire to get or to maintain power and wealth. In other words, according the CLS view, law is not based on a concept of justice at all, but on the political and economic motives of those who are in a position to make the law at a given time.

Insular Frustration

Say you live on the island-state of Frustration. This state is overpopulated, and there is nowhere to go. Chaos threatens. A law exists making homelessness a crime punishable by life imprisonment. Your family knows where some homeless people are hiding, but you protect them and tell no one because doing so would be immoral. One day the homeless, who are starving, break into your home and steal your food and money. Then they do so again. Now will your family turn in the homeless? Will the judge follow the law and sentence them to life in prison? What if the judge is your aunt? Can justice be found anywhere in this situation?

The CLS philosophers say that justice is a myth. Those who have power will manipulate the law to serve their own ends. Those who don't may suffer. So no one person or group should be able to use the law to remain in power. The social structure, and the laws, have to be constantly reexamined and redefined so that tyranny of this sort cannot exist.

Questions in the case of the homeless on the island-state of Frustration might be: Why put them in prison because they are poor? What else might be done to solve the problem? How about forcing people with homes to let the homeless move in? Is this more just, or less just? Can justice be achieved for both groups? Why or why not? Can the law be changed to ensure justice instead?

Try to write such a law here.

Student Handout 2

Justice in the State of Frustration

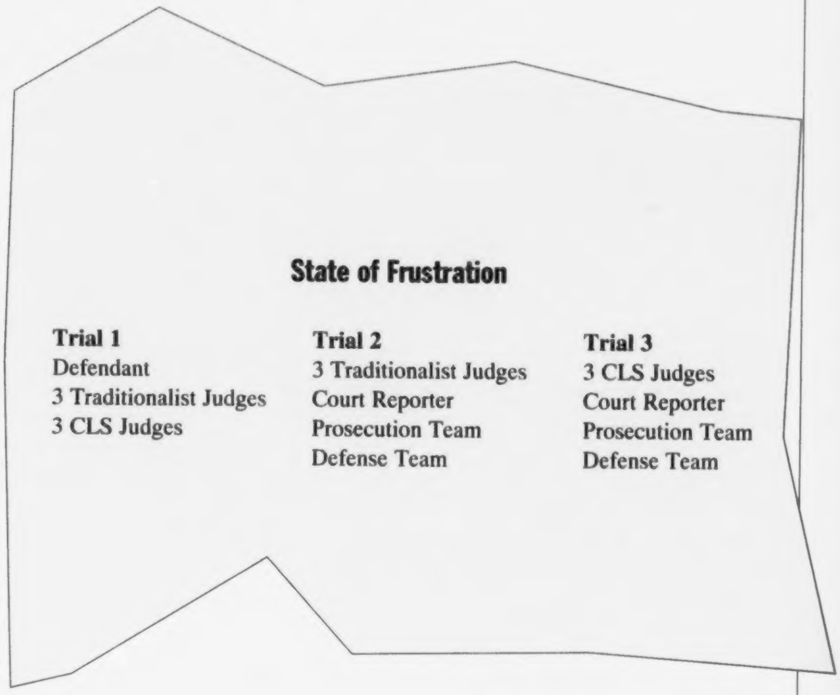
Problem

The legislature on the crowded island-state of Frustration has passed a law making homelessness a crime. All homeless people are required by law (1) to leave the island on a small raft with a week's (furnished) provisions, (2) to voluntarily become a household slave, or (3) to go to jail until ready to select 1 or 2.

There is no constitution in Frustration other than a basic statement that the legislature is the supreme authority and law-making body of the land. Its laws are absolute, and there are no overriding constitutional provisions such as "equal protection" or "due process of law." But all persons to be tried as criminals have a right to counsel if their sentence involves going to jail.

A captured homeless person has refused to leave town or to become a slave. This person will go to jail unless the defense attorney can win the case in the Court of Frustration.

There are two three-member panels of judges who decide all cases for the Court of Frustration. One panel has the Traditionalist Western view of justice, and the other has the Critical Legal Studies view. Obviously, the defense and prosecuting attorneys' approaches will have to be very different depending on the panel deciding the case. As attorneys, they know how to tailor their arguments to the philosophy of the judges.



State of Frustration

Trial 1	**Trial 2**	**Trial 3**
Defendant 3 Traditionalist Judges 3 CLS Judges	3 Traditionalist Judges Court Reporter Prosecution Team Defense Team	3 CLS Judges Court Reporter Prosecution Team Defense Team

The Simulation

Directions: Pretend that your class is in the State of Frustration. Elect six judges—three for the traditionalist panel, and three for the CLS panel. Assign a court reporter to each panel. Choose a student to be the defendant. Then split the remaining students into two defense teams and two prosecution teams, with one of each arguing before one panel of judges only. Each team will select a defender or prosecutor to argue the case before the judges, and each will prepare arguments appropriate to the judges and the side of the case for which they are arguing.

Start trial 1 by having the defendant present his or her own case before both panels at the same time. Each panel should make a decision about the defendant's fate and seal it in an envelope for later reference.

Then conduct two trials in which the defendant is represented by a defense attorney and the state is represented by a prosecuting attorney.

As the defenders and prosecutors present their cases, the court reporters will note down their arguments. These will be given to the judges, who will deliberate in front of the class. (The class will not speak during these deliberations.) Finally, the judges will announce their decisions, and the class will compare them in light of the arguments the attorneys made.

Comparative Legal Services

An analysis of the delivery of legal services to the poor in nations around the world

Edward M. Wise

Three Approaches to Funding

Giving poor people equal access to law is a worldwide problem. It has not been completely solved anywhere. There is no simple solution. Different countries have tailored partial (and not always satisfactory) plans to their own particular situations.

One possible solution is to have lawyers serve the poor for free. Starting in France in 1851, nineteenth-century European laws required private lawyers to provide legal services to the poor without charge. While this method is generally thought inadequate today, it remains the main approach in such countries as Belgium and Italy.

This approach may work better elsewhere than it would in the United States, where each side usually pays its own lawyer. In most other countries, a person who loses a civil case has to pay the legal costs, including attorney fees, for both sides. Thus, the lawyer who takes a poor client's case and wins can expect to be paid by the losing side.

Another partial solution is to rely on private groups (such as legal aid societies or trade unions) to help people who cannot afford a lawyer.

In Japan, the state does not fund legal aid in civil cases. It is provided by private groups, most notably the Japan Legal Aid Association. This legal aid typically is a loan, which must be repaid if the lawsuit succeeds.

In many places, trade unions are important providers of legal aid. This is true not only in Belgium and Italy, where the official legal aid does not pay lawyers, but also in Germany and England, where it does. Although England has the most expensive state-funded system in the world, English trade unions provide lawyers for their members in lawsuits over accident claims (not necessarily work related). This happens in about 29 percent of all accident cases. A further 28 percent of people suing over personal injury receive state-paid legal aid.

In Brazil, where the free legal services provided by state governments are underfunded and inadequate, church social welfare organizations are an important source of legal aid in some areas.

A third solution is state-funded legal services. Although some people disagree, this is widely seen as the best solution. Yet most countries set aside little money for legal services. In many nations, such help is available only in the most serious criminal cases and is slight or nonexistent for civil matters. Countries that devote meager funds to legal services include not only developing nations, but also relatively rich democracies such as Italy and Japan.

Rights and Reality

Even where legal services are a constitutional right, public funding may be inadequate. For instance, the Brazilian constitution guarantees that "legal assistance will be granted to those who need it in the manner established by law."

The law requires the courts to appoint counsel to represent indigents. The appointed lawyer may work for a private firm or a legal service agency. Most large cities in Brazil have public legal aid offices, but these are sometimes hard to reach. The offices' part-time lawyers are not always there.

Lawyers in private firms are expected to represent indigents without pay (unless they win a civil case and get paid by the losing side). In reality, Brazil's legal services reach only a small fraction of the poor, and the constitutional guarantee of legal assistance is said to be an illusion for the most part.

Similarly, the Italian constitution says: "Poor persons shall be assured, through appropriate institutions, the means to plead and defend themselves before any court." Yet Italy also relies mainly on court-appointed lawyers working without pay (again unless they are paid by the losing side in a civil case). The state pays lawyers to represent indigents only in cases involving employees' rights and benefits and in cases involving very serious criminal charges.

Switzerland, on the other hand, has done an admirable job of implementing its constitutional right to free counsel for poor people. In 1937, over a half century ago, the Swiss Supreme Court declared poor people did not have "equality before the law" as was guaranteed by that nation's constitution. Consequently, the court ordered the governments of the cantons (states) to

Note: In order to avoid misinterpretation, the term *legal services* is used in this article wherever the author is discussing the delivery of both civil legal services and indigent defense. *Legal aid* is used to denote civil legal services.

Edward M. Wise is professor and director of the Comparative Criminal Law Project at the Wayne State University Law School in Detroit, Michigan.

provide free lawyers to poor litigants in civil cases. In a series of decisions since 1937, the court broadened and enforced this constitutional guarantee.

In *Airey v. Ireland*, 2 E.H.R.R. 305 (1979), the European Court of Human Rights ruled that the "fair hearing" guaranteed by the European Convention on Human Rights means that all European governments must provide free lawyers to poor people who cannot effectively make a claim without legal help.

The case involved an Irish woman who could not afford a lawyer. A court refused to appoint a lawyer to represent her when she sought a legal separation from her husband. To comply with the *Airey* decision, the Irish government in 1980 set up a state-funded system that has a staff of lawyers. It is, however, quite limited and mainly deals with family-law problems, particularly domestic violence.

It is somewhat embarrassing to note that if the United States were part of the European Convention, we would be in violation of *Airey v. Ireland* because we do not guarantee free counsel for poor people in civil cases.

State-funded Judicare Systems

About a dozen countries pay for wide-reaching and more-or-less effective legal services. For the most part, these countries have "judicare" systems. Judicare pays private lawyers (rather than its own staff of attorneys) to provide legal services. Among those relying on judicare are three western European countries: Germany, France, and England.

Since the mid-1870s, German law has guaranteed that nation's poor a right to free counsel in civil as well as criminal cases. Germany first provided funds to pay the lawyers representing the poor in 1923. In 1980 West Germany extended legal services from only the poor to people of moderate means who could not afford legal costs. The German system now pays lawyers to give legal advice as well as represent clients in court.

German courts handle applications for free representation in court. The court must decide (1) whether the applicant is financially eligible for legal services; and (2) whether, in a civil case, the claim is serious and has a chance of success. The second point permits the court to review the merits of a civil lawsuit before the case is actually tried.

The court usually appoints the private lawyer requested by the applicant. Public funds will pay the lawyer somewhat less than German lawyers are regularly allowed to charge. If the lawyer wins the case, he or she may get the full fee from the losing side. The client who has income or other properties above a certain amount may have to repay the state, perhaps in installments.

France also has had a right to counsel for poor people since the 1870s. In 1972 France acted to begin paying private lawyers to provide these services. The French system was extended to legal advice outside court in 1991. As in Germany, people who are not financially eligible for full legal aid may receive partial funding.

In France, applications for lawyers in civil cases are screened by a legal aid bureau—a local committee of government representatives, judges, and lawyers. If an applicant is financially eligible, legal aid must be granted unless the case has no chance of success.

The appointed lawyer is paid from public funds at fixed rates somewhat lower than those ordinarily charged. A winning lawyer may obtain an ordinary fee from the losing party (although in France the exact size of the fee is set by the court).

Applications for legal advice on matters that do not go to court are handled by separate legal aid boards in each of the departments into which France is divided. These boards mainly coordinate the help available through groups such as bar associations and voluntary organizations.

☆ ☆ Three Systems ☆ ☆

Free Services from Private Attorneys
*Example Nations**
Belgium
Italy
England

Free Services from Private Groups
- Legal aid societies
- Trade unions
- Church organizations

*Example Nations**
Japan
Brazil

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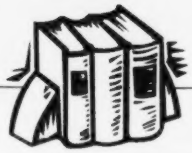
*Use(s) this system to a great extent, but not to the exclusion of other systems.

State-funded Legal Services
- **Staff-attorney system**
  *Example Nation**
  Finland
- **Judicare**
  *Example Nations**
  Germany
  France
  England
- **Mixed systems**
  *Example Nations**
  Netherlands
  Sweden
  Canada/Ontario, Quebec



Vocabulary

Bar associations are organizations of lawyers.

Civil cases focus on the private rights of individuals and the laws protecting those rights. Civil lawsuits deal with such matters as ownership, contracts, and personal injury.

Criminal cases deal with acts that are believed to harm society as a whole, such as murder, robbery, and assault.

A *felony* is a serious crime.

Indigents are poor people.

IOLTA stands for Interest on Lawyers' Trust Accounts. Law firms hold a variety of funds in trust. These funds earn interest that pays for nonprofit programs, such as legal services for poor people.

Judicare is a system of legal services. Judicare uses public money to pay private lawyers to represent poor people.

Legal aid offices are funded in a variety of ways to furnish legal services to the poor. Many provide both civil legal aid and indigent defense. Legal services to juveniles may also be provided.

Legal services are any of several programs that deliver legal aid and indigent defense.

A *litigant* is someone who engages in a lawsuit.

Litigation is a lawsuit or other legal proceeding.

Magistrates' courts in England and Wales try most minor offenses. These courts are run by justices of the peace, most of whom are not trained lawyers.

Per capita means "for each person."

A *plaintiff* is a person who files a lawsuit.

Pro bono describes legal services performed by a lawyer who is not paid to provide these services.

Staff-attorney systems pay a staff of lawyers, rather than private lawyers, to represent poor people.

England has had a right to counsel for poor people in civil cases for almost 500 years, since 1495, to be exact. In 1949 the English government set up an ambitious program to pay the lawyers who were providing those services. The goal was to guarantee every English citizen the same quality legal representation that well-to-do citizens enjoy. Initially, the English system covered about 80 percent of the population. Even now, despite more restrictions on who's eligible, legal services are at least partly available to people of moderate means.

In England, a national Legal Aid Board supervises a network of legal aid offices that handle applications for legal aid. Area committees made up of lawyers consider applications and reject cases that have no reasonable chance of success.

In criminal cases, the courts generally determine whether a case deserves legal services. Legal aid offices do not themselves provide legal assistance. A successful applicant receives a certificate that entitles her or him to the services of a solicitor and, if need be, a barrister. (Barristers generally try cases in the higher court. Solicitors advise clients, prepare cases for trial, and also do a lot of trial work in lower courts.)

Under the "green form" scheme first introduced in 1973, English solicitors are paid for giving advice to clients who meet government guidelines and declare they are eligible for funding simply by signing a green form. (Today the solicitors are paid for up to two hours of advice.)

The English system also pays duty solicitors who take turns advising unrepresented defendants in magistrates' courts, and it also pays lawyers employed by the 55 community law centers.

When the current English system was established in 1949, there were those who argued that legal services should hire its own staff of lawyers. Instead, the system pays private lawyers who provide legal services and advice.

The United States rejected judicare when it set up its federal system during the 1960s. Instead, our system relies on neighborhood law offices. These employ full-time lawyers who specialize in legal problems connected with poverty.

The English community law centers, which date from the 1970s, reflect American influence. They are increasingly important, but hardly central to supplying legal services in England; they account for less than 1 percent of the public legal-services budget.

Mixed Systems

In some countries, the trend to combine judicare with a staff-attorney system is much further advanced than it is in England.

Europe

In the 1950s, the Netherlands set up state-supported legal services that relied on private lawyers. This system has been supplemented by legal aid bureaus (boros) in each judicial district. Until recently, staff lawyers at these boros gave free legal advice to the public and handed out certificates allowing an applicant to use a private attorney.

Since 1993, the certificates have been handled by a separate entity—a new bureau for providing legal services. Under the new system, boro lawyers can now represent clients in court as well as give legal advice. Roughly 18 percent of the Dutch budget goes to the boros, 82 percent to judicare.

The Scandinavian countries likewise have combined judicare and a staff-attorney system. Sweden relies mostly on judicare but also has 28 county bureaus with staff lawyers. Clients are free to choose between a staff lawyer or a private lawyer.

Norway relies more on judicare but has two offices with salaried lawyers who provide legal advice. Finland has 164 bureaus staffed by 212 lawyers, covering most municipalities in the country. Given the low number of lawyers in Finland, clients may have to use staff lawyers.

Australia

In Australia, legal services are funded by federal and state governments and by interest earned on money held in trust by lawyers (equivalent to IOLTA in the United States). New South Wales, the largest Australian state, established a public defender office in 1941. A public solicitor's office followed in 1943 to provide legal services in civil matters.

In the 1970s, the system was expanded to use both private solicitors and community law centers. The state has 26 community law centers, some specializing in particular fields of law such as consumer, environmental, welfare, and immigration law.

In New South Wales, the legal services system provides free legal advice by staff in branch offices across the state, the advice of a duty solicitor in each court, and grants of legal services for both criminal and civil court cases.

Cases may be handled either by legal services staff or private lawyers. Most staff lawyers focus on criminal cases. Private lawyers handle about 76 percent of the civil cases covered.

For legal aid to be granted, a case must have a good chance of success. Financial guidelines on who's eligible are fairly stringent. As a result, less of the population is served in New South Wales than in many places outside Australia.

North America

In Canada, legal services are the responsibility of the provinces (equivalent to states in the United States). Criminal and civil services generally are under the same umbrella. In the province of Ontario, what started as a criminal program is now almost equally divided between criminal and civil legal services.

Ontario has an area office that runs judicare in each county. It also has 51 legal aid clinics, which provide services not traditionally offered by private firms. About 90 percent of Ontario's legal services budget goes to judicare and about 10 percent to the clinics.

In the province of Quebec, 151 legal aid offices are staffed by lawyers in 117 cities. An eligible client may choose a private lawyer from a list of those willing to take legal services cases; otherwise, a staff attorney will be assigned. Staff lawyers provide about 60 percent of legal aid in civil cases in Quebec, paid private lawyers about 40 percent. Private lawyers handle a higher share of criminal cases.

Comparisons

In Canada and most European countries, legal services are funded more generously and therefore are more widely available than in the United States. This remains true despite cutbacks in the past decade and increasing pressure around the world to reduce government spending.

It has been estimated, for instance, that England spends nearly seven times as much per capita as the United States on civil legal aid. Ontario spends six times as much, the Netherlands five times as much, Sweden and Quebec about four times as much, and Germany and France twice as much. To give you an idea of what this means, if the Legal Services Corporation's budget for the United States were to match the English legal aid budget on a per capita basis, it would be 3.5 billion rather than its present 400 million dollars a year.

As a result, legal aid in these countries serves more people than does legal aid in the United States. Every applicant who meets the criteria for legal aid is entitled to receive it. The legal aid client usually receives the same services that a paying client would receive.

In these countries, legal aid generally reaches people whose income would disqualify them in the United States. It has been estimated that roughly 80 percent of people in Sweden, 65 percent in the Netherlands, and between 37 percent and 52 percent in England (depending on the type of case) qualify for at least partial legal aid. In the United States, even genuinely poor people may be refused legal aid if the local program, working within a limited budget, does not have the staff to accept them as clients.

The picture is complicated by other differences. For example, in the United States, poor plaintiffs in personal-injury cases usually can hire a lawyer on a contingent-fee basis. The client is not charged if he or she loses but has to pay the lawyer a substantial portion of any money received if the suit succeeds. Most other countries see such contingent fees as unethical. In the United States, at least in certain kinds of cases, the contingent fee partly substitutes for a public legal-aid program.

So do the voluntary pro bono services provided by American lawyers. These amount to about 10 percent of the free legal aid available in the United States. Countries with judicare generally rely much less on pro bono work; it is awkward to ask private lawyers to offer for free the same services for which the government pays other private lawyers.

The staff-attorney program in the United States has been controversial largely because of what some consider its great strength—its ability to tackle system-wide law reform and strive for policy changes on behalf of low-income groups. Countries that rely mainly on judicare have avoided much of this controversy.

Judicare systems have been confronted, however, with spiraling costs. Countries such as England, with very high public spending on legal services, are now considering whether to rely more on less expensive staff (or perhaps franchised) legal services. Thus they are beginning to move toward the American system for delivering legal services. Yet they continue to guarantee civil as well as criminal representation as a matter of right, something we still don't do in the United States. ◆

South Africa: Any Hope of Equal Justice?

SILENCE
IS
CONSENT

REUTERS/BETTMANN

South Africa has a very short tradition of legal services and a very long tradition of injustice.

For decades South Africa's courts enforced its apartheid laws, which discriminated against black and mixed-race people but protected the privileges of whites. For example, the early laws stated that a black person could not remain in a white area for more than three days without permission. Marriages between whites and people of other races were banned. Black South Africans could not own land outside designated areas.

Almost all black South Africans—85 percent—who appeared in criminal court had no lawyer. About 100,000 undefended people were sent to prison each year, most of them black. Accused people had few rights; the defense did not know in advance what evidence or witnesses the state planned to use, and improperly obtained evidence was admissible in court. Black South Africans were at a severe disadvantage.

Now that South Africa is moving toward a society that recognizes black and mixed-race people as the equals of whites, equal justice for all is one of the country's ideals. Whether that ideal will become reality remains to be seen. The Legal Resources Center (LRC), a nonprofit public interest law firm, has existed in South Africa since 1979. It provides civil and criminal legal services without charge to the poor, homeless, and landless, and those who suffer race, gender, and other types of discrimination. The LRC is supported by contributions and grants from around the world, and many consider it to be the best public-interest law firm. Three other public-interest law firms, the Black Lawyers' Association, the Lawyers for Human Rights, and the Community Law Centre, also provide free legal services, as do many South African law schools today.

Two years ago the first South African Public Defender Office opened. Only very poor people were entitled to use its services, and they had to seek it out—courts rarely informed people that it existed. Yet within the first six months, the office handled almost 1,500 cases and won more than half its trials.

Despite this success, the office's future is uncertain. The government initially hoped that businesses would contribute money to run the office, but that did not happen on a wide scale. Some people criticized the office as being too dependent on the white government. Because the country faces huge problems with poverty and unemployment among its black citizens, some people believe protecting the rights of defendants is less of a priority. However, with a newly elected black government in power, the ideals of equal justice will hopefully become a priority and/or reality.

Information about the South African Defender Office is taken from David J. Winer, "S. Africa's Public Defender System Faces Uncertain Future," *Chicago Daily Law Bulletin*, 10 June 1994.

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Teaching Strategy

Justice for All?

Julia Ann Gold

In this lesson, students investigate a little-discussed topic—how we provide (or better stated, do not provide) civil legal services for the poor in the United States. First, students complete an opinion poll. They identify cases for which they think the government should provide legal assistance. They are then presented with information on the law as it relates to each case.

Background

In the United States, the courts have ruled that the government must provide lawyers for persons accused of a crime who face a jail sentence. In civil cases, people who cannot afford legal help are not guaranteed the help of lawyers. Yet the majority of court cases are civil-law cases. These cases include family matters, such as divorces and child custody; entitlement to public benefits, such as food stamps, social security, and Aid to Families with Dependent Children (AFDC); breach of contract cases; collection of debts; property issues, including landlord-tenant disputes and the purchase of real estate; personal-injury cases, such as car accidents and medical malpractice; wills and estates; and more.

The provision of civil legal services in the United States depends on the pool of government money available to pay lawyers for representing the poor, not on the number of clients actually in need. The result is that civil legal services programs often cannot help all those who qualify. Many private law firms will accept civil cases on a pro bono, "for the good" (or free), basis. Yet the pro bono work and the government legal services cannot begin to help all the people in need. Some people would say that many poor people are denied equal access to our system of civil justice.

Many countries have declared that people have the right to counsel in civil cases even if they cannot afford to pay for it. Most back up this guarantee with government funds to pay for legal services. The United States has greatly increased funding for legal services over the last 20 years, but it still remains behind other democracies. For example, England spends seven times as much as the United States on a per-capita basis, and Germany spends twice as much.

Objectives

In this lesson students will

- identify when a person is entitled to a free lawyer
- examine policy implications of providing free lawyers in certain types of cases
- rank client needs
- draft a policy statement about when free legal services should be provided for the poor

Target Group: Junior high and high school students

Time Needed: 1–2 class periods

Materials Needed: Student Handout 1 "Opinion Poll—Justice for All?" Student Handout 2 "Right to Legal Counsel"

Procedures

1. Give students a copy of Student Handout 1 "Opinion Poll—Justice for All?" and ask them to complete it individually.
2. After students have completed the poll, take a hand count for each issue, recording the information on the chalkboard. Encourage students to offer reasons for their opinions. Ask questions such as these:
   - Should it matter how complicated the legal proceedings are?
   - Should it matter what the consequences of the outcome of the legal proceedings are?
   - Can a person receive the "equal protection of the law" in court without a lawyer?
   - Can a person receive "due process" in court without a lawyer?
   - Can a person who is not represented by a lawyer achieve a fair result in court against a party who is represented by a lawyer?
   - Should a person accused of drunk driving get a free lawyer but not a person seeking protection from an abusive spouse?
   - Is custody of children as important as being tried for drunk driving?

   Then have students read and discuss the state of the law for each issue as noted on Student Handout 2 "Right to Legal Counsel."
3. Divide students into groups of 5, and tell them they are law firms. Assign each law firm 4 or 5 of the clients from the opinion poll (or others you create). Tell students to decide what cases they will take and to explain why. They should take at least 3 clients. Then ask each firm to report to the rest of the class which clients they will represent and why.
4. Have students work in the same small groups to develop a policy for when and to whom free lawyers should be provided.

Julia Ann Gold is Mediation Clinic Director, University of Oregon Law School, Eugene. Formerly, she was the deputy director of Seattle University of Law School's Institute for Citizen Education in the Law.

Student Handout 1

Opinion Poll—Justice for All?

Directions: Read each statement and place an X in the column that best reflects your opinion.

	Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree
a. Marta hires a lawyer to sue Reginald for $5,000 that she claims he owes her. Reginald says that he does not owe the money and cannot afford to hire a lawyer to defend himself. The government should provide a free lawyer to defend Reginald.					
b. Mai's husband left her and their three children. He has hired a lawyer and is seeking custody of the children. Mai wants to keep the children, but she cannot afford to hire a lawyer. The government should provide a free lawyer to represent Mai.					
c. April is arrested for shoplifting. She has no money to hire a lawyer to defend herself. The government should provide a free lawyer to represent April.					
d. David is arrested for murder and has no money to hire a lawyer to defend himself. The government should provide a free lawyer to represent David.					
e. Roberto wants to sue his landlord for the $500 security deposit that the landlord kept when Roberto moved out of his apartment. Roberto cannot afford to hire a lawyer to represent him. The government should provide a free lawyer to represent Roberto.					
f. Carrie is a low-income person whose husband abuses her. She wants a court order to keep him away from her, but she cannot afford a lawyer to help her. The government should provide a free lawyer to represent Carrie.					
g. Arnold wants to prepare a will. He cannot afford a lawyer to draft the will. The government should provide a free lawyer to help Arnold with his will.					
h. Eileen is arrested for drunk driving. She has no money to hire a lawyer to defend herself. The government should provide her a free lawyer.					
i. Fiona is addicted to drugs. Child Protective Services, a state agency, took her children away from her because they say that she neglected them. Now the state wants to end Fiona's parental rights to her children. Fiona cannot afford to hire a lawyer. The government should provide a free lawyer to represent Fiona.					
j. Tim wants to divorce Tina, his wife of 15 years. He cannot afford a lawyer. The government should provide a free lawyer to represent Tim.					
k. A government that provides free medical care for low-income families should also provide them with free legal services.					

Student Handout 2

Right to Legal Counsel

a. This suit is a private matter between Marta and Reginald. The government will not always provide a free lawyer in such a case. Marta's lawyer may have taken this case on a contingency basis. This means that her lawyer would receive a percentage of the amount recovered from Reginald rather than a set or hourly fee.

b. The government does not guarantee a free lawyer in divorce or custody cases. The government-funded legal services office in Mai's area handles custody matters and would probably take her case, depending on how busy the staff is. The staff must set priorities because of their heavy caseload. Mai would have to qualify under income guidelines and might have to wait longer than if she could hire her own lawyer.

c. Since April is accused of committing a criminal offense for which she could be imprisoned, she is entitled to a free lawyer to defend her if she cannot afford one.

d. David is accused of committing a very serious criminal offense (murder); therefore, he is entitled to a free lawyer if he cannot afford one.

e. In this case, Roberto could probably represent himself in small-claims court. Small-claims courts hear cases involving relatively small amounts of money, usually amounts under $2,500–$5,000. Most small-claims courts do not require lawyers, and many do not allow lawyers. The parties represent themselves. Filing fees are small, and the waiting period for a hearing date is usually short.

f. Carrie is not entitled to a free lawyer to help her get a court order protecting her from her husband. Many states, however, have advocacy programs that assist victims of domestic violence. Victim advocates help abused persons complete court filing papers and prepare them for court hearings.

g. Arnold is not entitled to a free lawyer to help him prepare a will. Some legal services offices can provide this type of service if Arnold fits within the income guidelines.

h. Eileen is entitled to a free lawyer since her offense, drunk driving, is one for which she could be imprisoned. If she qualifies under the income guidelines, the government will provide her with a lawyer.

i. If she qualifies, Fiona may be entitled to a free lawyer in this action that is challenging her parental rights. This is one type of civil case in which some states have held a person is entitled to a free lawyer.

j. Tim is not guaranteed a free lawyer. If he qualifies, he may be entitled to the assistance of a lawyer at a legal services office. If the office is very busy, this type of case would probably be a low priority. In many states, the divorce process has been simplified so that people can represent themselves.

k. Many argue that legal services are just as important as medical care since equal access to justice is at the heart of our democratic form of government.

Representation for the Poor

Legal services pioneer Reginald Heber Smith's 1919 book *Justice and the Poor* noted,

> "Differences in the ability of classes to use the machinery of the law, if permitted to remain, lead inevitably to disparity between the rights of classes."

Do you see this happening in our country? If so, what examples can you give?

EQUAL JUSTICE UNDER LAW

Right to Counsel

A look at when the state must provide legal services to the poor

John W. Guendelsberger

Four Amendments

There has never been much controversy over a person's right to a lawyer if he or she can afford the legal fees. The more difficult question has been whether the state must provide an attorney for someone who lacks the means to pay.

Before looking at the Supreme Court decisions, let's examine three parts of the U.S. Constitution that might require society to provide a lawyer for poor litigants.

Fifth Amendment: "No person shall ... be deprived of life, liberty, or property, without due process of law."

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense."

Fourteenth Amendment: "No state shall ... deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Which of these most clearly expresses a right to legal counsel in criminal cases? Which provides the best argument for civil cases? (Criminal cases deal with acts believed to harm society as a whole, such as murder. Civil cases focus on the private rights of individuals.)

The Sixth Amendment, which makes the only explicit reference to a right to counsel, is limited to criminal cases. As part of the American Bill of Rights, the Fifth and Sixth Amendments apply directly only to actions of the federal government, its agents, and its employees.

Therefore, these amendments apply directly only to federal courts—but about 95 percent of criminal cases are heard in state courts. Therefore, the right to counsel in state criminal cases must stem from some other part of the Constitution than the Sixth Amendment. It comes from the Fourteenth Amendment, particularly the due-process clause, which applies to acts of the states.

Criminal Cases

Capital Offenses

The U.S. Supreme Court first discussed the right to counsel for state criminal defendants in *Powell v. Alabama*, 287 U.S. 45 (1932). In *Powell*, several young African Americans were rushed to trial for capital offenses without a lawyer's help in their defenses.

In reversing their guilty verdicts, the Supreme Court held that the "failure of the trial court to make an effective appointment of counsel" was a denial of due process under the Fourteenth Amendment. The Court explained that a basic part of due process is the opportunity to be heard, an opportunity that means little if it does not include the right to counsel:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Although this language might suggest that people have a right to counsel in every criminal case, the scope of the Court's ruling in *Powell* was much narrower. The Court held only that "in a *capital case*, where the defendant is unable to employ counsel, *and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like*, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law."

Federal Cases

I[illegible]*son v. Zerbst*, 304 U.S. 458 (1938), the Supreme Court held that the Sixth Amendment required a lawyer to be appointed in *all* federal criminal cases. States continued to vary in appointing legal counsel for indigent

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John W. Guendelsberger is a professor of law at the Ohio Northern University College of Law in Ada.

defendants—some provided counsel in all felony cases, others in only capital cases.

Betts

In *Betts v. Brady*, 316 U.S. 455 (1942), the Court ruled that an indigent criminal defendant did not have an absolute due-process right to a state-paid lawyer in noncapital felony cases.

In so ruling, the Court held that the right to counsel in federal cases protected by the Sixth Amendment was not "so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment."

After reviewing the history of the right to counsel in colonial times, the Court concluded that a state's refusal to provide a lawyer to poor people in all criminal trials did not violate due process. Due process required the appointment of a lawyer only in cases where the penalty was severe, the issues difficult, and the defendant inexperienced.

In *Betts*, however, the penalty was moderate, the issues were simple, and the defendant of average intelligence and somewhat familiar with criminal procedure from earlier convictions. When all these factors were considered together, the Court concluded, Maryland's refusal to give Betts a lawyer did not violate due process.

Gideon

The Court sharply reversed course two decades later in *Gideon v. Wainwright*, 372 U.S. 335 (1963). It struck down a Florida conviction because the state failed to give the accused person a lawyer.

Although Gideon was charged with a felony (breaking and entering a pool room with intent to commit a misdemeanor), Florida law provided counsel for indigent defendants only in capital cases.

In *Gideon*, the Court overruled *Betts* and found for the first time that "the Sixth Amendment's guarantee of counsel is... one of those fundamental rights" protected by the due-process clause of the Fourteenth Amendment. The Court explained that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."

The *Gideon* decision left unresolved whether counsel would be required in nonfelony cases (misdemeanors and petty offenses).

Argersinger

In 1972, the rule for appointment of counsel was given a new twist in *Argersinger v. Hamlin*, 407 U.S. 25 (1972). At issue was a Florida law providing counsel when the charges could lead to more than six months in prison. Argersinger's charge, carrying a concealed weapon, was punished by exactly six months in prison.

In *Argersinger*, the Court rejected Florida's "six-months" approach to appointment of counsel and focused on whether the accused was ever actually deprived of liberty. The Court noted that "[t]he requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution," since such cases may be as complex as felony cases.

After *Argersinger*, "no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel." If a judge decides not to appoint counsel, a person who is found guilty can be sentenced only to fines or probation.

Dissenting Justices Powell and Rehnquist suggested that the *Argersinger* rule was too mechanistic and gave indigent defendants an advantage over those who earned just too much to get free counsel. They preferred the old *Betts v. Brady* case-by-case balancing approach.

Post-Conviction Rights

The due-process right to counsel extends beyond the trial to the first level of appellate review. In *Douglas v. California*, 372 U.S. 353 (1963), the Court relied on the equal protection clause of the Fourteenth Amendment. It also referred to its decision in *Griffin v. Illinois*, 351 U.S. 12 (1956), which required states to give indigent defendants a free transcript of their cases when they appealed. The Court reasoned that:

> In either case [denial of transcript or counsel] the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys "depends on the amount of money he has."

Since the *Douglas* decision, the Court has not relied on the equal protection clause when analyzing the right to counsel.

In *Ross v. Moffitt*, 417 U.S. 600 (1974), the Court refused to extend the *Douglas* rationale beyond the first level of appeals. States need not provide counsel for appeals to state supreme courts or for petitions to the U.S. Supreme Court. The Court stated that due process does not require "the same access" for indigent defendants as for those who can afford counsel. It requires only "adequate access" to the appellate system.

The right to counsel arose again in a new context: a hearing to revoke a person's probation or parole, sending that person to prison. In *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972), the Court held that the need for counsel at a hearing to revoke probation should be determined case by case. It depended on the complexity of the issues and the need for counsel in a particular case.

In *Gagnon v. Scarpelli*, 411 U.S. 778, 785-89 (1973), the Court also held that in hearings on revoking parole, due process gave no automatic right to counsel. However, due process required that the need for a lawyer be assessed case by case.

The logic behind these decisions in criminal cases was that a meaningful opportunity to be heard occurred only with a lawyer's help. This suggested that the Court might require counsel for indigents in civil cases in which important liberty or property rights were at stake. But the Court has been much more reserved in recognizing a right to counsel in civil court cases.

Civil Cases

Because the Sixth Amendment doesn't apply to civil cases in state courts, the right to counsel there comes from the due-process clause of the Fourteenth Amendment. (A similar due-process clause in the Fifth Amendment applies to civil cases in federal courts.)

Loss of Liberty

In civil cases in which a person may be held in mental-health or juvenile-detention facilities, the courts have recognized a due-process right to a lawyer. Although the person is not being held as a punishment, he or she suffers a severe loss of liberty. A person generally needs an attorney to present a good case against commitment.

Consequently, many states have laws that say indigents facing commitment are entitled to a state-paid lawyer. In other states, courts have ruled that the U.S. Constitution or the state constitution requires a lawyer to be appointed in such cases.

In *Vitek v. Jones*, 445 U.S. 480 (1980), the Supreme Court considered the need for counsel when a person in prison faces a possible transfer to a mental hospital. The Court found that the person required a lawyer, because of the additional stigma of entering a mental hospital and the additional loss of liberty involved.

In the case of minors being committed against their will by parents, the Court held that no right to counsel exists. This is because the parents had a role in a decision that was medical, nonpunitive, and informal.

The Supreme Court has ruled that a minor who could be sent to a facility for juvenile delinquents has a right to a lawyer. The Court observed that "the juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon the regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." *In re Gault*, 387 U. S. 1, 36 (1967).

No Rights

Beyond cases involving actual loss of liberty, however, the Supreme Court has not recognized a constitutional right to a lawyer. Many civil cases, such as divorce, child custody, and civil-rights suits, involve high stakes—stakes at least as high as the few weeks in jail that could result from an unfair misdemeanor conviction. A parent involved in a child-custody dispute with the state, for example, may not understand why he or she can have a lawyer to fight a misdemeanor charge but not an action to end parental rights.

In the early 1970s, the Supreme Court seemed to be moving toward recognizing a poor person's general right to counsel in civil cases. In *Boddie v. Connecticut*, 401 U.S. 371 (1970), the Court ruled that due process meant a state could not charge a welfare recipient $60 to file for divorce. The Court in *Boddie* stressed that "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."

Lassiter

The reasoning in *Boddie* suggested that people might require a lawyer's help in order to get a fair divorce hearing. In *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), however, the Court made clear that it would not recognize such a broad right to counsel.

The Court held that the state had not violated due process by failing to appoint counsel before terminating a person's parental rights. It announced a case-by-case test for deciding when the right to counsel existed in civil cases.

Unless physical liberty is at stake, the Court explained, there is a presumption that no right to a lawyer exists. When physical liberty is not at stake, the right to counsel depends on three factors: (1) the importance of the individual interest at stake, (2) the state's interests in proceeding without counsel, and (3) the extent to which a lawyer might reduce the risk of an unfair decision.

In *Lassiter*, the Court recognized that the first two factors favored appointing a lawyer. The parental interest at stake was of the utmost importance. The state had only a weak interest in avoiding the expense involved. When the third factor was considered, however, the Court found a lawyer could have done little to obtain a different outcome.

Lassiter at the time was serving 25 to 40 years in jail for murder. Her child was already in state custody. The Court found that, on balance, the three factors in Lassiter's case did not outweigh the presumption she had no right to a lawyer. Denial of counsel did not violate due process.

Blackmun Dissent

Four of the nine justices dissented in Lassiter. Justice Blackmun expressed regret that the majority had adopted for civil cases the approach rejected for criminal cases in *Gideon* 20 years earlier. Justice Stevens questioned whether a few months in prison should be considered more important than permanent loss of parental rights. When such important liberties as parental rights are at stake, he suggested, the courts should not use a balancing test to decide whether counsel should be appointed.

The Supreme Court has not returned to the right to counsel in civil cases since its landmark decision in *Lassiter*, leaving this issue largely to the discretion of the states. Some state courts have expanded the right to counsel in some civil cases. Other states have enacted laws giving indigent people a right to a lawyer in civil cases. ◆

Activities

1. A collection of taped arguments in landmark U.S. Supreme Court cases includes the arguments in *Gideon v. Wainwright*. The collection, *May It Please the Court* by Peter Irons and Stephanie Guitton (1993), is available in many public libraries. The *Gideon* tape is about 20 minutes long and provides a good start for discussing the right to counsel and the Court's role in shaping this right.

   Many students would enjoy A. Lewis's *Gideon's Trumpet* (1964), a brief and very interesting account of the struggle to establish the right to counsel in *Gideon*.

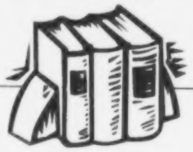
2. Ask students to apply the principles developed by the Supreme Court in right-to-counsel cases to other situations. Should a student facing expulsion in a school disciplinary hearing be entitled to an attorney at state expense? Should the right to counsel exist in every such hearing, or should the seriousness of the charge, the difficulty of the issues, and the possible consequences make a difference?

   In *Goss v. Lopez*, 419 U.S. 565, 583 (1975), high school students had been expelled from school for disruptive behavior during a demonstration. The Court held that due process required a hearing before expulsion, but because such hearings would normally be brief, informal, and part of the education process, state-appointed counsel was not required.

3. Under federal law, no aliens shall be deported to a country where they might be killed or persecuted because of their political opinions. Students could discuss whether an indigent alien who claims that she will be killed or imprisoned in her home country because of her political opinions has a right to a lawyer in a deportation hearing brought by the Immigration and Naturalization Service (INS). (Because the federal government [INS] seeks deportations, the alien's right to counsel must be based on the Fifth Amendment due-process clause.)

4. Ask students to consider what expense would be involved in providing counsel for poor people in civil cases. Who should pay the attorneys? How should the funds be collected? Is the potential cost one unstated reason that the Supreme Court is reluctant to recognize a broad right to counsel in civil cases? Might there be other unstated reasons?

5. Have students decide whether, as a condition of the right to practice law, a state might require attorneys it licenses to spend X hours each year representing poor people in civil or criminal cases. Would such a requirement, without pay, violate the Thirteenth Amendment to the Constitution? This Amendment says "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in the United States, or any other place subject to their jurisdiction."



Vocabulary

Adversary system of law is one in which each side presents its case in court, and the person who best presents the case wins. The adversary system is used in the United States.

Appellate review occurs when the losing side in a court case asks an appeals court to review the decisions made by the first, or lower, court.

Bill of Rights contains the first 10 amendments to the U.S. Constitution providing for individual rights, freedoms, and protections.

Capital cases are those in which a person found guilty might be sentenced to death.

Civil cases focus on the private rights of individuals and the laws protecting those rights. Civil lawsuits deal with such matters as contracts and personal injury.

Commitment is the act of handing over a person for safekeeping, for example, to a mental hospital.

Criminal cases deal with acts that are believed to harm society as a whole, such as murder and robbery.

A defendant is a person accused or sued in a law court.

Due-process rights are fundamental rights that require the government to treat all people with fairness and justice.

Federal cases are heard by the law courts of the central government of the United States.

A felony is a serious crime.

A litigant is someone who engages in a lawsuit.

Litigation is a lawsuit or other legal proceeding.

Misdemeanor or *petty offense* is a less serious crime than a felony.

Noncapital felony cases deal with serious charges that do not carry a death penalty.

Parole is a conditional release from jail before the full jail term has been served.

Probation is the practice of letting first or young offenders go free without serving the punishment they have been sentenced to, unless that person commits a further offense.

Student Forum

Should the Poor Have Free Legal Representation?

Margaret Fisher

To the Teacher
The Student Forum is a student-organized open discussion of a legal issue. Your role is to provide copies of materials to the students and to serve as a consultant. The forum is expected to take from two to five class periods depending on the number of characters included and the amount of discussion involved. Copy and distribute forum pages 59–62 to each student. You will need two copies of the ballot on page 62 for each student.

This Student Forum is an opportunity for you to take charge of your own learning. The forum is similar to a town hall meeting in which people come together to discuss ideas and issues. In the forum, you will explore the state and federal governments' role in providing free legal representation in civil and criminal cases. You will also examine your personal views on the subject.

Before the forum begins, you will complete a ballot to identify your attitudes about free legal representation. Following the forum, you will complete another ballot to determine whether your attitudes have changed.

Margaret Fisher is Director, Institute for Citizen Education in the Law, Seattle University Law School, Tacoma, Washington.

How to Organize and Conduct a Forum

1. The class selects five students to serve on the forum panel.
2. All students complete the pre-forum ballot and submit it to the panel.
3. All students form groups to develop or adapt character sketches for the forum.
4. The class members identify community members that they would like to invite to participate in the forum. With your teacher's permission, panel members invite guest speakers to the forum.
5. The panel selects student volunteers to serve as facilitator and clerk. It also identifies the students chosen to role-play the characters.
6. The clerk schedules the presentations of the characters and the guest speakers for the facilitator.
7. The students conduct the forum.
8. The class members discuss what policies they would implement.
9. All students complete the post-forum ballot. The panel reviews, compares, and summarizes the results.
10. The panel submits the tally to the American Bar Association.

Getting Ready

To prepare for the forum, read the Round Table, Vignettes, and other materials that interest you in this issue of *Update on Law-Related Education.* Then, as a class, brainstorm viewpoints for and against free legal representation for poor people. Your teacher will chart these viewpoints on the chalkboard.

Know These Terms

Civil cases: Cases that involve private disputes with others, including the government. A child-custody case is a civil case.

Criminal cases: Cases brought by the government to enforce the criminal law. A murder trial is a criminal case.

Legal aid lawyers: Lawyers who are paid to provide free legal representation to poor people involved in civil cases

Public defenders: Lawyers provided by the state to give free legal services to poor people accused in criminal cases

As a class, identify community members whom you would like to invite to participate in the forum. You may wish to ask, for example, a legal services lawyer, a government official, a public defender, or a defendant in a civil suit to testify during the forum.

Organize into an even number of groups of up to five students. With your group, choose a viewpoint for which you will develop a character. Make sure that an even number of pro and con viewpoints are chosen by the groups.

Develop and write a character sketch to promote your viewpoint. These pages include sample character sketches. You may use or adapt these sketches or create your own. Your character sketch should include the character's name, a specific viewpoint on free legal services for poor people, background information about the character that supports the viewpoint, and a request that a specific policy position be adopted. After you have developed the character sketch, select a group member to play the character's role in the forum. Give a copy of your character sketch to the panel and tell the panel who will role-play the character.

Roles Students Have in the Forum

Panel members
Clerk
Facilitator
Characters
Audience members

The Role of Panel Members

The panel organizes the forum. Members tally and submit the results of the pre-forum and post-forum ballots. The panel sends ballot data to the ABA. It invites community members to participate in the forum upon recommendations from the class. It reviews and selects characters to be included in the forum and selects student volunteers to serve as clerk and facilitator. It provides a list of student and guest participants to the clerk. During the forum, panel members serve as members of the audience.

The Role of the Clerk

The clerk receives a list of characters and guest speakers from the panel. The clerk then schedules the speakers for the forum. She or he may organize the presentations so that, for example, each pro position is followed by a con position or all pro positions are presented first followed by con positions. The clerk presents the schedule of speakers to the facilitator. During the forum the clerk may wish to take notes.

The Role of the Facilitator

The facilitator opens the forum with a statement of purpose, such as "to explore what policies to adopt regarding free legal services for the poor." The facilitator calls on speakers to present their arguments in a five-minute period. He or she times the presentations and encourages audience members to ask questions and participate in a discussion of the issues. The facilitator closes the forum.

The Role of Audience Members

The audience, students who have not assumed roles as clerk, facilitator, or characters, participates by listening to testimony, asking questions, and discussing the issues.

The Role of Characters

Characters have five minutes to testify about their experience, viewpoint, and recommendation. They are questioned by the audience and should answer consistently within their role.

SAMPLE CHARACTER SKETCHES

Character 1

My name is Hammie Muldrow. I feel very strongly that the government should spend more money for legal services for civil cases.

Since I injured my back five years ago, I am no longer able to work. I have been receiving federal disability payments, which are my only source of income. One year ago, on my birthday, in fact, I received a letter informing me that I was no longer eligible for federal assistance. The letter explained that I could appeal the decision to stop my payments. What could I do? Without that check, I'd be out on the streets, living in shelters.

I went to the Legal Aid office in our community to see a lawyer. I was interviewed by a paralegal who told me that I had a basis for challenging the government. She said that unfortunately legal services could not accept my case because they were not taking new cases. She referred me to a private attorney who sometimes takes cases for free. He was also unable to help me. As I desperately considered what I could do, the legal services paralegal called me and said that they would now be able to take my case. Several cases had unexpectedly been settled. I would never have been able to handle this very complicated case by myself. With legal services help, my benefits were returned to me.

I never understood why the government cut off my benefits or how the legal services lawyer was able to get them back. The legal system gets very technical. How can people, like me, protect our rights in our legal system if free lawyers aren't provided to us? In my case, if I had not received this help, I would have lost my benefits. People have a right to be treated fairly by the government. The government should have to pay for lawyers to ensure this right when people don't have the money to pay for lawyers who understand the system.

Character 2

My name is Tinh Doan. My family owns and runs a small grocery store. Five months ago, three people robbed the store when I was on duty. They beat me so badly that I almost died. They also stole all the money in the store. My hospital bills are for tens of thousands of dollars. My store has had to close. As the result of the beating, I will always be blind in one eye and I have dizzy spells and headaches regularly.

Each of the accused robbers has a lawyer that taxpayers—including me—pay for. Now they are free on bail because their lawyers argued that they will show up for trial.

These three robbers are costing taxpayers several thousands of dollars in legal representation. It is clear that these people are the ones who beat me up. We are wasting money paying for them to have lawyers. This money should be put into services and restitution for crime victims. Do you know how much money I have received? Nothing yet! I have been told that I am eligible to receive some payment from the victim fund, but it will not cover the losses that I have suffered.

The government must balance the rights of its citizens and make decisions on priorities. Surely, the rights of criminal victims should be protected more than those of the criminals. Of course, sometimes there are times that the government makes mistakes and arrests the wrong person. Really, though, that doesn't happen too often.

My position is balanced. I am in favor of eliminating free legal services for criminal defendants when there is sufficient evidence that they are guilty.

Character 3

My name is Steve Allerman. I was released from prison two months ago after serving ten years on drug charges. I would like to point out the reality of the type of representation people like me receive from public defenders. I and others who are accused of crimes that could send us to jail receive free representation from public defenders.

We poor people get assigned a lawyer, paid for by the same government that pays the prosecutor who is trying to get us convicted. None of us has any trust in the public defender. I've had a lot of public defenders because I have a long history of charges.

Many of the defenders are fresh out of law school and were so nervous in court that I never had a chance of getting a fair deal. They hate to come to the jail to see me because it takes a long time to get in for a visit. They don't return my telephone calls. They have way too many cases to give the time it takes to prepare a good case. Look at O. J. Simpson and his team of lawyers. How can you say that the American system of justice is fair when there's no way I could ever have that kind of talent working for me?

In one of my cases, the public defender couldn't find my witnesses because I only knew their street names and he couldn't get anyone to talk to him. I was locked up in jail and couldn't get out. I was convicted because no witnesses were called for me.

I propose that people charged with crimes get vouchers with which they can hire good attorneys to represent them. They should be able to fire the lawyers when they're doing a bad job.

Character 4

My name is Dana Smith. I am a policy analyst in a think tank. There is a crisis in the criminal justice system. Year after year, Congress, state legislatures, and citizen initiatives make more activities a crime and demand prison terms for more and more offenses. This year, for instance, voters passed the "Three Strikes and You're Out" initiative in our state, which puts criminals with three felony convictions in prison for life without parole. With increasing prison populations and increased crime rates, the criminal justice system is almost at a standstill.

A major portion of our budget pays to support our criminal justice system. It seems senseless not to undertake some major reform of this system.

One proposal that I favor is to abandon the adversarial system in which both sides fight out the case like enemies. Instead, I favor a system like the German system in which the judge investigates the case, questions the witnesses, and decides the case. This would allow us to focus resources more effectively in the search for truth and justice. Many people believe that our system of justice is more like a game, the one with the best lawyer winning. This would change that. Criminal defendants would be more likely to take responsibility for their acts rather than blame their lawyer for their situation.

EQUAL JUSTICE

Forum Ballot

Free Legal Representation of Poor People: What Should Society Do?

The American Bar Association wants to know what you think and feel about the government's role in providing free legal representation to poor people.

The student panel will collect ballots completed before and after the forum. The panel will compile and summarize the data and send the summaries to the Public Education Division, American Bar Association, 541 N. Fairbanks Court, Chicago, Il 60611-3314.

For the following items, place a ✓ in the box that best reflects your opinion.

1. Do you think the government should pay, and if so, how, for lawyers to represent poor criminal defendants?
2. Do you think the government should pay, and if so, how, for lawyers to represent poor clients in civil cases?

Complete Funding	Partial Funding	No Funding	Not Sure

3. Following are a series of proposals regarding funding of legal representation of poor people. For each indicate your level of support.
   a. Eliminate all funding for public defenders.
   b. Use money saved for victims of crime.
   c. People have a right to counsel in criminal cases only when they can afford to pay for a lawyer.
   d. Poor people have a right to a free lawyer in civil cases.
   e. Middle-class people should have government aid to pay part of the cost of lawyers in expensive cases.
   f. The government should fund legal services even though legal services brings some cases against the government.
   g. A poor person who has to go to court without a lawyer has equal protection of the laws and enjoys due process of law even though the other side is represented by a lawyer.

Support	Oppose	Not Sure

4. Several different proposals have been made concerning legal services. Rank how effective each would be on a scale of 1 to 10 in which 1 means least effective and 10 means most effective.
   a. Provide everyone in the United States with legal insurance. People would pay a monthly fee and then get an attorney when they need one.
   b. Make courts so simple that persons can use the courts to solve disputes without using a lawyer.
   c. Require everyone in a civil case to try to solve their dispute without lawyers before allowing the case to go to trial.
   d. In each case in which solving disputes without lawyers fails, both sides pay money to the court for the time of the judge and court personnel.

1	2	3	4	5	6	7	8	9	

5. Is this a pre-forum or post-forum ballot? (check one) ___ pre-forum ___ post-forum
6. Are you ___ Male ___ Female?
7. What is your ZIP Code? ______________________

Resources

Legal Services to the Poor

Center for Law and Education

955 Massachusetts Avenue
Cambridge, MA 02139
617/876-6611 FAX 876-0203

A grantee of the Legal Services Corporation (below), the Center for Law and Education (CLE) "takes a leadership role in improving the quality of public education for low-income students throughout the nation and to enable low-income communities to address their own public education problems effectively." CLE's activities include providing advice and collaboration on cases, publications, training, federal program advocacy, litigation, and assisting parent and student involvement in education. Some of the many school-related concerns CLE addresses are the educational rights of children with disabilities, the federal Chapter 1 program, vocational education, and school-to-work programs.

Children's Defense Fund

25 E Street, NW
Washington, DC 20001
202/628-8787 FAX 662-3540

Created in 1973, the Children's Defense Fund (CDF) is a nonprofit organization supported by foundations, corporations, and individuals. CDF's goal is "to educate the nation about the needs of children and encourage preventive investment in children before they get sick, drop out of school, suffer family breakdown, or get into trouble." CDF activities include public education, research, technical assistance, policy development, and national legislation, with particular attention to the needs of poor children and families. CDF will issue a major report on the costs of child poverty in late 1994.

Legal Services Corporation

750 1st Street, NE, 11th Floor
Washington, DC 20002-4250
202/336-8800 FAX 336-8959

An independent, nonprofit corporation established by Congress in 1974, Legal Services Corporation (LSC) has a mission "to ensure equal justice for people living in poverty through the provision of high-quality legal representation and to further the ends of justice and improve the lives of poor people through the rule of law." This mission is accomplished primarily through funding and oversight of various grantee programs that provide direct services. (Two of the grantees are included in this list.) In 1993, LSC programs helped over 1.5 million individuals and families solve legal problems through advice and referral, brief services, dispute resolution, negotiation and settlement, and litigation. The majority of cases involve family issues, such as custody and protection from family violence, income maintenance for families and the elderly, consumer finance, housing, and juvenile matters.

National Center for Youth Law

114 Sansome Street, Suite 900
San Francisco, CA 94104
415/543-3307 FAX 956-9024

A grantee of the Legal Services Corporation, the National Center for Youth Law (NCYL) has a mission to improve the lives of children living in poverty and to use the law to protect children from the harms poverty causes. NCYL's services include free expert legal advice on youth law matters to legal services attorneys and child advocates; publications, such as the journal *Youth Law News;* and litigation on laws and public policies to improve the conditions in which poor children live—e.g., *Sullivan v. Zebley*, 493 U.S. 521 (1990), to entitle the poor, disabled children to receive monthly Supplemental Security Income benefits.

National Clearinghouse for Legal Services

205 W. Monroe, 2nd Floor
Chicago, IL 60606
312/263-3830 FAX 263-3846

Serving as the central repository of national poverty law documents, as well as a disseminator of information to advocates for low-income clients, the National Clearinghouse for Legal Services, Inc., (NCLS) is the communication hub for the legal services community. NCLS services are available to advocates working in legal services programs funded by the Legal Services Corporation and to others working on behalf of low-income people. The NCLS Poverty Law Library, established in 1967, currently houses more than 51,000 cases and publications. Its documents are retrievable at no or low cost through the Legal Records Department. *Clearinghouse Review*, the premier publication of the legal issues affecting low-income people, is sent free to each attorney and paralegal practicing in a legal services program funded by LSC.

National Legal Aid & Defender Association

1625 K Street, NW, Suite 800
Washington, DC 20006-1604
202/452-0620 FAX 872-1031

As a private, nonprofit national-membership organization for local organizations, programs, and individuals that provide civil legal aid and criminal defense services to the poor, the National Legal Aid & Defender Association (NLADA) has two goals: to see that all America's poor people can get legal help when they need it in both civil and criminal proceedings and to ensure that this help is equal in quality to that provided to paying clients. Founded in 1911 by members of the private bar and 15 legal aid offices, NLADA provides training for professionals serving the poor and files amicus briefs at appellate levels on poverty law and indigent defense cases of national importance. NLADA publishes the *Directory of Legal Aid and Defender Offices in the United States and Territories*, a listing of general civil or criminal organizations, whether or not they are members of NLADA.

EQUAL JUSTICE UNDER LAW

Equal Justice Topics

	Civil Law	Criminal Law	History	Who's Who	Student Activity
A Salute to the National Equal Justice Library	☆	☆	☆	☆	
History of Legal Aid in the United States	☆		☆	☆	
Heroes of Legal Aid	☆		☆	☆	
Benchmark Civil Cases	☆		☆		
Students Take Charge	☆				☆
History of Indigent Defense in the United States		☆	☆	☆	
Heroes of Indigent Defense		☆	☆	☆	
Benchmark Indigent Defense Cases		☆	☆		
Legal Services and American Cities	☆	☆	☆	☆	
The American Bill of Rights	☆	☆	☆		☆
Round Table	☆	☆			
Vignettes	☆	☆		☆	
You Be the Judge		☆			☆
Comparative Legal Services	☆	☆			
Justice for All?	☆				☆
Right to Counsel	☆	☆	☆		☆
Should the Poor Have Free Legal Representation?	☆	☆			☆

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LAW-RELATED
EDUCATION
Issues
Young people speak out about fairness, justice and equity—the list of issues is long

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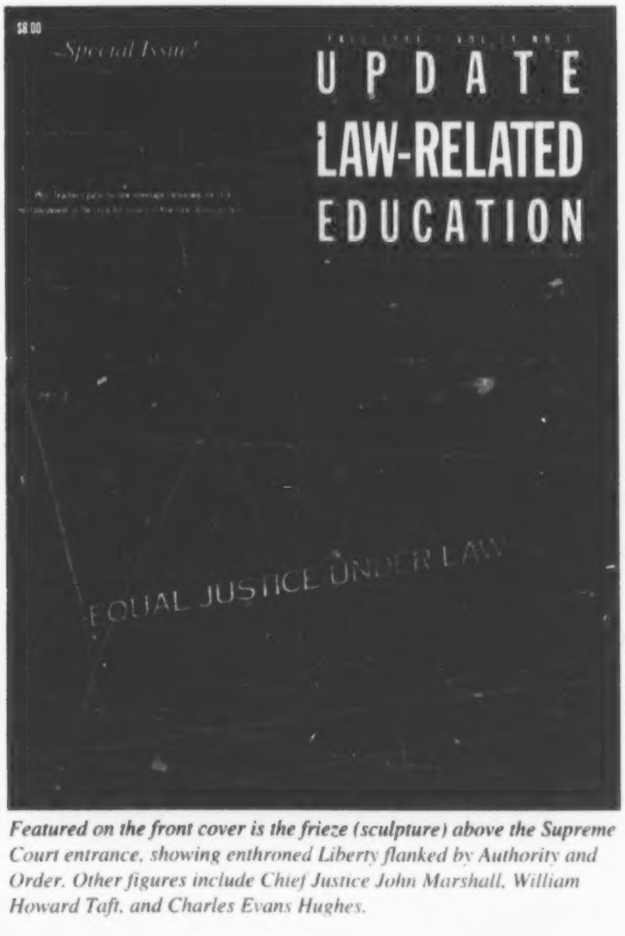

Featured on the front cover is the frieze (sculpture) above the Supreme Court entrance, showing enthroned Liberty flanked by Authority and Order. Other figures include Chief Justice John Marshall, William Howard Taft, and Charles Evans Hughes.

COMING THIS WINTER:

Special! Law Day Issue!
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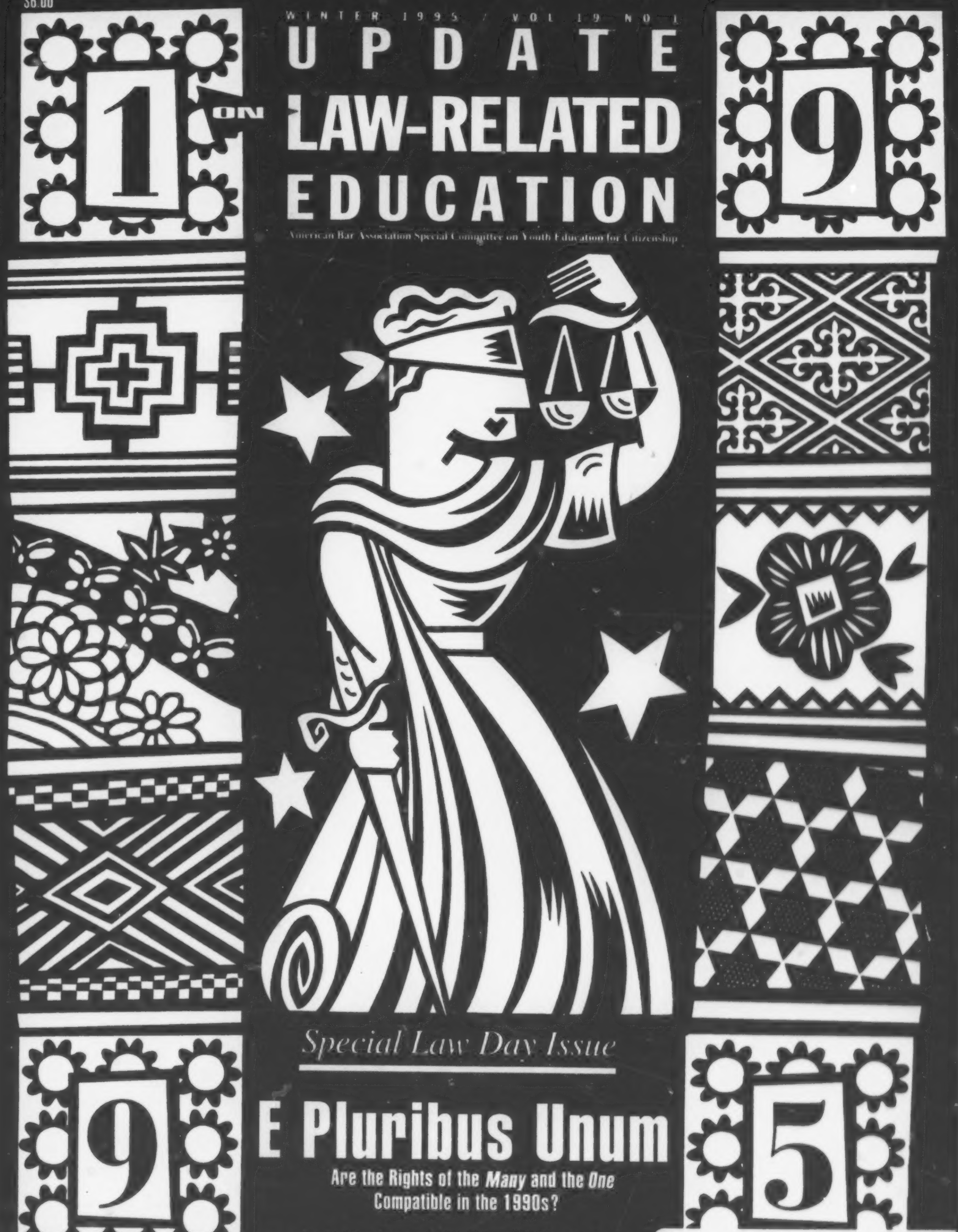
WINTER 1995 / VOL 19 NO 1

UPDATE ON LAW-RELATED EDUCATION

American Bar Association Special Committee on Youth Education for Citizenship



Special Law Day Issue

E Pluribus Unum

Are the Rights of the *Many* and the *One* Compatible in the 1990s?

Plus! Articles, Lessons, Information, and Teaching Strategies

358

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E Pluribus Unum—Out of Many, One

> *Oh, wonder!*
> *How many goodly creatures are there here!*
> *How beauteous mankind is! Oh, brave new world,*
> *That has such people in 't!*

So spoke Miranda to her father Prospero in the final act of William Shakespeare's *The Tempest*, first performed in the early 1600s. But what new world is unfamiliar and fascinating to this adolescent child? One that isn't varied at all; instead, it's completely homogeneous.

Years before, political intrigue in Milan had forced Duke Prospero to flee with infant Miranda. They arrived on an island sanctuary with inhabitants the likes of which Prospero had never seen before, and the challenges of living in a culturally diverse environment confronted him for the first time. What was his response? The expedient (and familiar) will to dominate.

The only native inhabitant of the island was Ariel, a spirit of the air who had been enslaved and later imprisoned in a pine tree by an earlier arrival, Sycorax the sorceress. Sycorax had died, leaving Ariel trapped in the tree. Her son, Caliban, a spirit of the earth, would have ruled the island had not Prospero arrived, releasing Ariel and making both spirits work for him. Each wanted his freedom, but Prospero feared havoc if he did so, particularly on the part of Caliban, who declared himself the island's rightful ruler.

This is Miranda's "familiar" world. What's brave and new is the world of the latest arrivals—shipwrecked European aristocrats—her own kind. As fate (and Shakespeare) would have it, she falls in love with a Neapolitan prince and is scheduled to return to Italy with Prospero and the other humans, leaving Ariel and Caliban to go their ways. She, a product of diversity, wonders at the prospect of living a culturally uniform life. We'll never know how she fared.

By now, it should be apparent that solving social problems by everyone finding a homogeneous environment is indeed the stuff of fiction. As a society with an increasingly diverse population, we haven't Shakespeare's poetic sleights of hand for marginalizing real-life conflicts between dissimilar peoples. But what we can hope for is that, as Miranda, America's coming generations will look upon our cultural diversity as the norm, and not the exception—something they can work at and work within because it is theirs. This wonderful Law Day edition is dedicated to this goal.

Many thanks go to all the LRE professionals who have given so freely of their experience, talents, and time in producing the E Pluribus Unum edition. There are so many that space does not allow mentioning them all. But a special acknowledgment goes to Gayle Mertz, our tireless guest editor, who, despite a daunting schedule and already demanding professional responsibilities, somehow found the time to turn an undeveloped concept into the exceptional instructional resource now in your hands. Anyone who has been privileged to work with Gayle knows the source of her energy—an unflagging dedication to the civic education of young Americans. We thank her for placing it on loan to YEFC this summer and fall.

European migrations to the new world had already started in Shakespeare's time, and the numbers of emigrés were massive by the 1800s, when Alfred, Lord Tennyson, was writing. Fascinating stories of exotic lands and strange new peoples had been filtering back for well over two centuries. When Tennyson chose to portray Ulysses's musings, he had the aging wanderer reflect on the many peoples he had encountered and whom he ached to see again, saying "I am a part of all that I have met." Perhaps Miranda came to know this same longing for the many, making one—a loss from which our richly textured society is happily exempt.

Seva Johnson

Seva Johnson
Editorial Director
Youth Education Publications

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DON'T MISS OUR SPECIAL "SCHOOL VIOLENCE AND THE LAW" EDITION SCHEDULED FOR PUBLICATION THIS WINTER!

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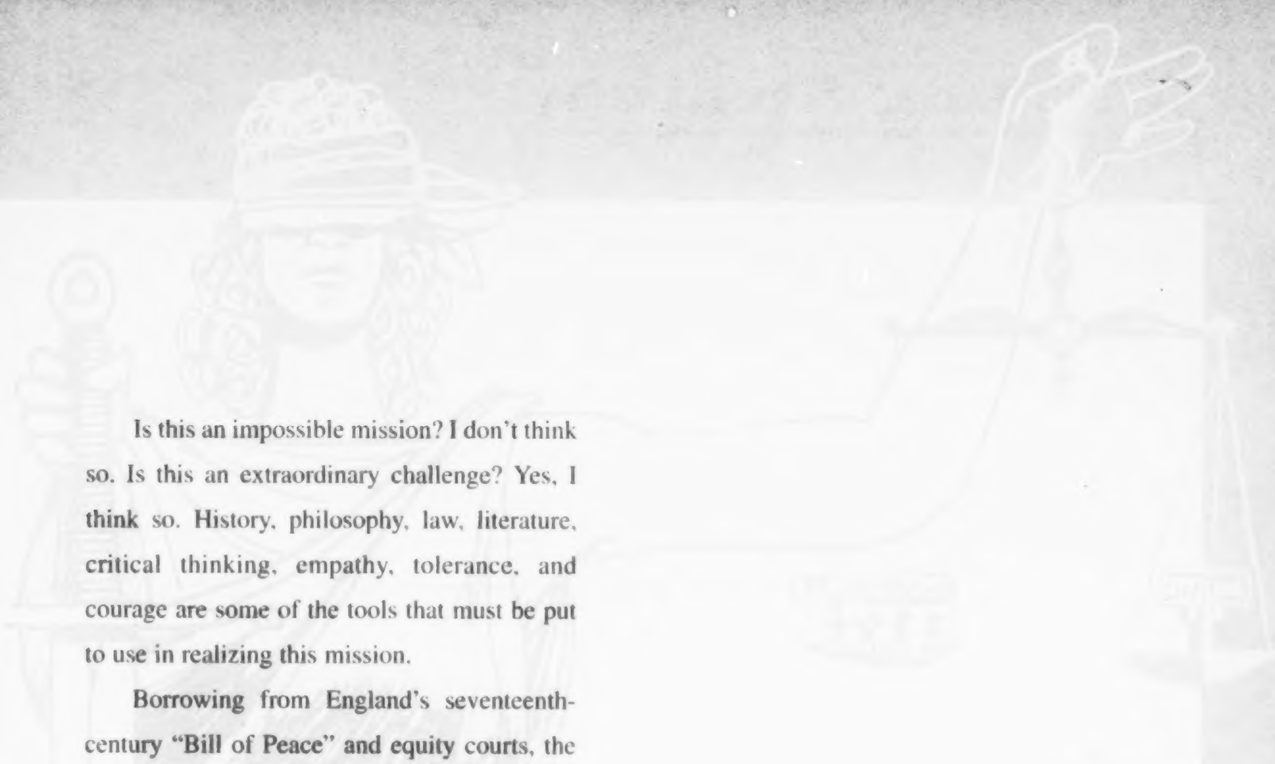
Foreword

If there was one landmark United States Supreme Court decision that applied constitutional principles to the issues addressed in this journal, it might be titled *Individual Liberties v. Pluralism.* But there is no such court decision to report to you. Legal interpretation in this arena is yet to be forged. The task of defining, and perhaps resolving, seemingly incompatible approaches to protecting civil and human rights will hopefully be accomplished as today's students mature and enter the political and policy-making arenas themselves.

In 1908 Israel Zangwill, a Jewish playwright living in London, used a metallurgical term as a metaphor for his new play about U.S. immigration—*The Melting Pot.* The term moved quickly and comfortably from the theatrical stage to political platforms, pulpits, and social policies. Not until recently did sociologists, political activists, and linguists reexamine the institutionalized metaphor. Directly, multiculturalists and ethnic advocates stepped forward to replace the outdated phrase with the healthier, more contemporary image of a salad bowl. Ethnic pride is the message. Less optimistically, others have labeled the mix of dissimilar peoples in the United States the boiling pot. Melting pot, salad bowl, boiling pot. What will be the next metaphor?

Our ability to recognize, much less classify, what distinguishes one group from another becomes more blurred as we become more aware of the variety of groups asserting their "rights." Some of us have easily been able to distinguish between a German American and an Italian American. Others of us are more skilled at discerning the difference between a Cherokee and a Kwakiutl.

As the practice of formally identifying ourselves as individuals has shifted toward a more complex convention of basing such identification on our membership in a group, our legal and social systems have been forced to evaluate the appropriateness of applying law and policy to such groups. We are women, children, blacks, union members, lesbians, Asian Americans, and law enforcement officers. Often requirements for group membership are not clearly defined but are attained when an individual simply proclaims it so. The task at hand is to determine whether we should grant the same fundamental rights to groups that we have historically granted to single individuals.



Is this an impossible mission? I don't think so. Is this an extraordinary challenge? Yes, I think so. History, philosophy, law, literature, critical thinking, empathy, tolerance, and courage are some of the tools that must be put to use in realizing this mission.

Borrowing from England's seventeenth-century "Bill of Peace" and equity courts, the drafters of our Constitution included in Article III, Section 2, the following: *The judicial power shall extend to all cases, in law and equity, arising under this Constitution....* Prior to the ratification of the Fourteenth Amendment, equity courts (in which questions common to a class of people predominate over questions unique to one plaintiff) were relatively unknown in this nation. This approach to ameliorating inequities experienced by members of identifiable groups became a popular twentieth-century avenue to redress. Perhaps most noteworthy was the use of class action suits by civil rights advocates.

How can we now equitably apply existing law and policy to changing populations and emerging demands for unprejudiced treatment? Must the law change? Must we change? Must the demands of these groups change?

I invite you to imagine the legal arguments that you would develop in defending any position in this ideological dispute. I also invite you to consider whether these issues should appropriately be settled by our courts or legislatures, or whether they are best left to social scientists, religious communities, or other qualified leaders.

Individual Liberties v. Pluralism? Or can we find common ground?

Gayle Mertz

Gayle Mertz
Director, Safeguard Law-Related
Education Program,
Boulder, Colorado
Guest Editor

Teaching Strategy

Divided We Stand?

Joe O'Brien

Background

Each new U.S. generation strives to define both itself and the nation, struggling to reconcile a host of interests and beliefs that often conflict. For example, Americans have always struggled with how to strike a balance between developing a common identity as Americans and fostering individual and group self-expression.

In 1835, Alexis de Tocqueville noted that individualism is one of the unique features of the American character. Ongoing debates over issues such as the constitutionality of affirmative action and the amount of political power wielded by "special interests" illustrate our discomfort with group rights and power.

Thus, while individualism has been closely tied to the "American" identity, group expression and identity have proven troublesome. Many immigrants, for example, strive to become American, yet tenaciously cling to their previous national or ethnic identities. How else is it possible to explain the irony of American compounds such as *Polish American* and *Japanese American*, and ethnic enclaves such as Chinatown or Little Italy in every major metropolitan area?

Group identity is not restricted to national or ethnic origins but involves all types of groups. Witness Amish communities, the disabled, and homosexuals. Today, the issues associated with these groups are lumped under the term *diversity*, as if this were a new phenomenon. Yet, these group-related issues stretch back to the beginning of the country's history and include

- the disestablishment of state-supported religions in the late 1700s
- race relations as exemplified by the U.S. Supreme Court's decision not to recognize African Americans as citizens in *Dred Scott v. Sanford*, 60 U.S. 393 (1857); the Thirteenth Amendment, which abolished slavery (1865); the Court's *Plessy v. Ferguson* decision, 163 U.S. 537 (1896), which established the "separate-but-equal" doctrine; and the Chinese Exclusion Act (1882), which suspended Chinese immigration
- the declaration in *Reynolds v. United States*, 98 U.S. 145 (1879), that the Mormon practice of polygamy was not in keeping with Western culture
- the guarantee to women of the right to vote under the Nineteenth Amendment (1920)
- the guarantee of freedom of speech protection to members of the Communist Party in *Yates v. United States*, 354 U.S. 298 (1957).

Each generation in U.S. history has struggled with these, and other, "diversity" issues and attempted to (re)define and (re)balance the principles underlying American society and, ultimately, the legal system.

In this activity, students will explore some of the diversity issues facing their generation. In so doing, they will discuss what they consider to be the overriding legal issues and principles most critical to the future of their society.

Objectives

Students will have the opportunity to

- define *diversity*
- cite and explain legal issues and principles related to diversity
- apply the legal issues and principles to hypothetical situations
- evaluate the results of each of these applications
- rank-order the legal issues and principles according to their importance to furthering American society

Target Group: High school students
Time Needed: 2–3 classroom sessions
Materials Needed: Student Handouts 1 and 2

Procedures

1. Have students brainstorm meanings and sources of diversity. These might include "differences" and "culture and religion," for example. Then have students identify legal issues and principles associated with diversity, such as hate speech and equal protection under law. Discuss the ideas generated, and ask students to give reasons for their examples. Explain how these ideas are tied to issues facing society today.
2. Introduce and administer the survey on Student Handout 1, "What Do You Think?"
3. With a show of hands, see how students responded to each survey question. Discuss the results, particularly in light of your recent brainstorming session.
4. Work with the class to identify, define, discuss, and list legal issues and principles associated with each survey question. For example, for question 2, students might identify public safety and freedom of speech. Other examples might include equality, justice, liberty, privacy, cultural diversity, national identity/citizenship, public health, freedom of expression, rights of the accused, and rights of the victim.
5. Have students rank-order their list according to each item's importance to society. Ask them to explain the reasoning behind the rankings.

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Joe O'Brien is assistant professor of curriculum and instruction at the University of Kansas in Lawrence.

Student Handout 1

What Do You Think?

Below are some proposed bills that your congressional representative wants your opinion about. She will cast her vote on each bill according to how you and your classmates respond. Underneath each bill is a scale from *Strongly Oppose* to *Strongly Favor*. Circle the response that most closely reflects your thinking. Circle *Unsure* if you are unfamiliar with the bill or not yet sure whether you favor or oppose it. Remember, you will need to explain your choices!

1. English shall be established as the official national language.

Strongly Oppose **Oppose** **Unsure** **Favor** **Strongly Favor**

2. Speaking in public in a highly negative way about a group of people shall be a misdemeanor.

Strongly Oppose **Oppose** **Unsure** **Favor** **Strongly Favor**

3. The existence and degree of sexual harassment shall be determined based on the effects an action under question has on the one allegedly harassed.

Strongly Oppose **Oppose** **Unsure** **Favor** **Strongly Favor**

4. The federal government shall provide money to African-American colleges and universities.

Strongly Oppose **Oppose** **Unsure** **Favor** **Strongly Favor**

5. The federal government shall provide money to traditionally male-only colleges and universities.

Strongly Oppose **Oppose** **Unsure** **Favor** **Strongly Favor**

6. The ethnic/racial identity of each individual shall be determined by that individual.

Strongly Oppose **Oppose** **Unsure** **Favor** **Strongly Favor**

7. Individuals shall be required to register and maintain proof of their ethnic backgrounds.

Strongly Oppose **Oppose** **Unsure** **Favor** **Strongly Favor**

8. A family shall be defined as those with blood or legal connections who live together.

Strongly Oppose **Oppose** **Unsure** **Favor** **Strongly Favor**

9. Each individual shall receive an equal educational opportunity, no matter the cost.

Strongly Oppose **Oppose** **Unsure** **Favor** **Strongly Favor**

10. Students shall be required to provide school districts with personal information that relates to public health/safety concerns.

Strongly Oppose **Oppose** **Unsure** **Favor** **Strongly Favor**

11. Employers shall not hire anyone under 18 years of age.

Strongly Oppose **Oppose** **Unsure** **Favor** **Strongly Favor**

Student Handout 2

How Strongly Do You Believe This?

Directions: Read each hypothetical situation and identify the legal issues and principles involved. Decide how you would respond to each. Be prepared to give reasons for your decisions that are tied to the rankings of legal issues and principles on the list your class has already created.

1. A ninth-grade student and her parents do not want school officials to know that she has AIDS. She is new to the community and is fearful about how people will respond. On the other hand, teachers want to know about such conditions to best provide for all students. Also, the school district is facing a budget crisis and will no longer provide teachers with full comprehensive health insurance. The new health insurance policy will not cover the expenses of AIDS treatment, should a teacher contract the disease from a student.

2. Under the Americans with Disabilities Act (1990) and other legislation and court decisions, school districts are required to provide an equal educational opportunity to the disabled. A hearing-impaired child lives in a small rural community. Having a school sign-language interpreter is the only way she will be able to know what the teachers and students are talking about. There is no person capable of interpreting for the child in over a 50-mile radius. Because of both family and economic reasons, the family is unable to move. There is a teacher who might be willing to relocate, provided the school offers her a salary that is 25 percent more than other teachers receive.

3. The U.S. Department of Education is drafting a regulation that requires a student to be at least 50 percent African American before qualifying for scholarships designed to enhance African-American higher education opportunities.

4. Congress has outlawed sex discrimination. A woman has sought admission to a state-supported male-only military university. Seeking to deny her admission, university officials have cited the school's 150-year, all-male tradition. Even more important to the school, admitting a woman would dramatically alter the purpose of the university as a military academy for young men. Mixing women and men at the school would prove disruptive. The school day is oriented not only around classes but around a harsh routine—one that is impossible to maintain with women.

5. Federal funds are provided to historically black colleges both to ensure their continuation and to preserve a variety of higher education opportunities for this group. Several Southwestern universities with a large number of Hispanics are considering making a similar request of the federal government.

6. A development is zoned for single-family dwellings. A family from Southeast Asia moves into one of the houses. The family consists of over 20 members, including cousins, aunts, uncles, and two sets of grandparents. The neighbors ask the local housing office to decide if the group qualifies as a "single" family.

Did You Know? The largest ancestry group in the United States is German, with about 58 million people; the next nine groups, in order, are Irish, English, African American, Italian, Mexican, French, Polish, American Indian, and Dutch (with about 6.25 million). Source: U.S. Bureau of the Census, 1990.

E Pluribus Unum

Diverse Ideas from a Native American Perspective

A look at the collective nature of Native American life, and legislation designed to protect it

Richard A. Monette

E Pluribus Unum. Out of Many, One. Something wonderfully cyclical resonates from that old Latin phrase. Today, it symbolizes the United States of America, whose strength comes from the gathering of distinct peoples of different races and cultures into a common people with shared interests and values. In America, the strength of the *Pluribus* depends upon the strength of the *Unum*, and vice versa. A full-circle reading of the phrase is reminiscent of the old Musketeer battle cry "All for one and one for all."

Diversity in the University

In America, the "university" is a place of ideas. On university campuses across America, "diversity" is a hot topic for debate. Pardon me, did I say "diversity" when speaking of the "university"? Can the two coexist?

The word *university* draws heavily from its base words, *uni* and *verse*—words struggling to represent the commonalities of the universe running through everything. Of course, the word *diversity* begins with *di*, meaning more than one, accounting for the differences of the parts within the whole. Ideally, the mission of the university, in an educational context, is every bit as immense, and every bit as immeasurable, as the universe itself. The universe encompasses all things, no matter how diverse. Likewise, the university, being a place of ideas, should encompass all ideas, no matter how diverse. Like the universe and America, the university's strength draws from its *pluribus*, or diversity, for the success of the *unum*, the university. Indeed, the two can and must coexist.

The diversity debate in our universities has drifted into our educational institutions at all levels, from high school down to kindergarten. And one thing is certain: today's students will be tomorrow's leaders in a world far more representative of the world's diversity, and their experiences in the classroom will guide both their endeavors in the workplace and America's international standing. Recent actions to diversify our schools on racial grounds have subtly illustrated the inherent value of having faces of different colors and features in the classroom. More important, students and teachers of diverse cultures bring the richness of different beliefs and practices to the classroom.

Native American Ideas

Unfortunately, the diversity debate seems to focus only on racial or cultural diversity. However, neither culture nor skin color necessarily determines the nature of a person's values, interests, philosophy, or politics. And race and culture certainly do not determine the level of an individual's intellectual capacity. Therefore, our educational system must be more than racially and culturally diverse. With the university at its helm, it must remain a place of ideas, and the strength of America must draw upon the diversity of ideas.

Native Americans provide our classrooms with racial and cultural diversity. However, Native Americans also seek a tolerance for the diversity of their ideas. Consider that most Americans descend from those who came to America in the past 300 years after having been citizens of foreign societies and nations. As a result, they often couch their primary interests in terms of individual freedoms or civil rights. On the other hand, in the context of American history, Native Americans did not come here from anywhere. Rather, Europeans, Africans, and Asians encountered collective units of peoples with governments, cultures, languages, and religions. Native Americans couch their interests in terms of collective rights. It is the diverse nature of this idea that Native Americans would like to share with America's schools.

Consider the manner in which our country has dealt with collective groups of Native Americans. We have referred to them as nations, states, and tribes. We have referred to their place names as reservations, pueblos, and

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Richard A. Monette is assistant professor of law at the University of Wisconsin, currently on leave to the Department of the Interior as director of Congressional and Legislative Affairs at the Bureau of Indian Affairs in Washington, D.C. He is a member of the Turtle Mountain Band of Chippewa.

rancherias. We have recognized the vast differences that may exist from tribe to tribe. Almost always, we have recognized the collective nature of each tribe's existence.

Indian Child Welfare Act

Perhaps most important, America's laws dealing with Native Americans also reflect the collective nature of their existence. For example, in the Indian Child Welfare Act of 1978, Congress required federal and state courts to recognize the laws of the tribes over adoptions of the tribes' children. Prior to the federal law, in some states, Native American children were removed from their families and placed in foster homes at a rate up to 40 times higher than rates for non-Indian children. Quite often, non-Indian social workers measured the living conditions of the Indian child against a non-Indian standard, without considering many tribes' ideas regarding extended families, clans, and communities.

After much prodding by Indian tribes, the federal government finally recognized that Native American children are the future of tribes. Therefore, the act requires that tribe political institutions, including their own courts, must determine the future of Indian children. Where the act allows federal and state courts to have jurisdiction, these must recognize the different cultural values of the tribes. For example, in the American system, the "best interest" of the child is paramount. However, under the laws of many tribes and the Indian Child Welfare Act, the interests of the collective unit, whether family, clan, or tribe, often outweigh the interests of the child and the parents.

Indian Civil Rights Act

In yet another example, quite often Americans see social despair on the reservations and believe they can help. Their attempts at beneficence inevitably find them dealing with tribe governments. Unfortunately, and quite often at the urging of disgruntled tribe citizens, they seek legal means to restrict the tribe's government by imposing laws from the outside.

One such federal law is the Indian Civil Rights Act of 1968, which attempted to make tribe governments abide by the U.S. Bill of Rights. Fortunately, some members of Congress and the Supreme Court again recognized that the collective interests of tribes often outweigh individual interests. Therefore, the Bill of Rights does not restrict the actions of tribes when dealing with their own citizens. And, to the extent that tribes must consider rights within the context of the Indian Civil Rights Act, the Supreme Court ruled in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), that it is up to the tribe to decide when, how, and to what extent these rights apply. Only in this way can the collective tribe work as a unit to solve its problems and evolve its own culture and society in a democratic fashion.

NAFERA

Perhaps one of the more pressing problems that Native Americans face in our society has to do with their religious beliefs and practices. Because of government actions that restricted the religious practices of many Native Americans, in 1993 and 1994 Congress proposed the Native American Free Exercise of Religion Act (NAFERA). Unfortunately, many Americans and lawmakers misunderstand Native American cultures and religions. As a result, NAFERA was not enacted.

Like the Indian Child Welfare and Indian Civil Rights Acts, NAFERA would deal with tribes as collective units, recognizing both that they have the right to control their own cultures, including religion, and that, in many instances, the interest of the tribes outweighs the interests of their individual members. The ideology behind this law turns on an idea that is widely divergent from views held by most Americans.

Many tribes do not have a formal separation of religion and government. In fact, many have just the opposite—a formal connection between the two. And even in those tribes that have a formal separation, it is up to the tribe, not federal and state courts, to determine the separation's scope and extent. Therefore, individual Indians do not want the federal or state governments to infringe upon the free exercise of their religions, but they defend their tribes' rights to do just that in order to be self-governing. Only an adequate education will help non-Indians and their lawmakers understand this difference.

Native American students are not trying to impose their ideas of culture, religion, or government on others any more than they want others' ideas imposed on them. But they want to be able to participate in school, to bring their rich histories and experiences into the classroom, and to have their ideas tolerated and deliberated.

On every American dollar, an eagle holds leaves from the tree of peace in one claw and arrows of war in the other. The bundle of 13 arrows represents a Native American idea that one arrow standing alone is easily breakable, but a bundle of arrows united into one remains strong and unbreakable—an idea readily adopted by the 13 American colonies. *E Pluribus Unum* waves from the beak of the eagle, a sacred religious symbol to many Native Americans, reminding us that the strength of America's oneness lies in the diversity of its parts—including Native Americans, their governments, cultures, languages, religions, and ideas.

In this spirit, Sitting Bull of the Hunkpapa Lakota said, "Let us put our minds together and see what kind of life we can provide for our children."

◆

Teaching Strategy

Protecting Native American Religious Freedom

Lisa D. Harjo

Objectives

As a result of this lesson, students will

1. Recognize the status of American Indian religious rights in the United States
2. Be able to identify historical events and laws that relate to this status
3. Recognize issues that involve current struggles for the free exercise of American Indian religions
4. Be able to describe and explain court challenges to the American Indian Freedom of Religion Act (AIFRA) of 1978
5. Be able to formulate reasoned views regarding S. 2269, the proposed Native American Cultural Protection and Free Exercise of Religion Act of 1994

Target Group: Secondary students

Time Needed: 3 class periods

Materials Needed: Student Handouts 1–3

Procedures

1. The First Amendment states "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Discuss the Establishment and Free Exercise Clauses with students. Do they protect everyone, or are there exceptions?
2. Divide the class into small groups and pass out Student Handout 1, "Historical Intolerance of American Indian Religions." Have each group read the handout and discuss its significance for American Indians and all citizens.
3. As a class, have students share their feelings and opinions regarding the status of American Indians as citizens, and Indian rights to the free exercise of their religion.
4. Distribute Student Handout 2, "American Indian Freedom of Religion Act (1978)." Read and discuss the act.
5. Distribute Student Handout 3, "American Indian Religious Freedom Since 1978." Discuss how the acts H.R. 4230 and S. 2269 are meant to compensate for the AIFRA's inadequacy.
6. Divide students into five groups. Assign each group one of the presentation topics, which relate to the legislation proposed in S. 2269. Give students time to discuss the issues, develop their viewpoints, and plan their presentations.
7. When the presentations are finished, ask students to develop their own reasoned opinions on whether or not to vote for S. 2269. Facilitate class discussion of students' individual conclusions or opinions.

Presentation Topics

a. Certain locations sacred to Native Americans should be protected from tourism, development, and resource exploitation.
b. The religious use of peyote should be protected in all states of the United States.
c. Native American prisoners should be given access to their own spiritual leaders and be exempt from prison requirements that conflict with their cultural and religious customs.
d. Native Americans should be exempt from criminal prosecution under the Bald and Golden Eagle Protection Act if they are found in possession of eagle parts or feathers.
e. Executive departments and agencies should improve their collection and transfer of eagle carcasses and eagle body parts for Native American religious purposes, shipping them to the National Eagle Repository.

Lisa D. Harjo is executive director of the Denver Indian Center and a member of the Choctaw Nation of Oklahoma.

Student Handout 1

Historical Intolerance of American Indian Religions

North American Indian religions have their roots in traditions and beliefs that have guided these people for more than 30,000 years. The fundamental elements survive today in oral literature, ceremony, prayer, music, and symbols. The universe is the Indians' church. Sacred sites are scattered across the land and have been the location of the ceremonies and prayers that have kept the Indian world in balance.

Indian religions are as diverse as the tribes themselves, having evolved to modern times within varied geographic locations, cultures, and peoples. Yet all include certain fundamental elements. Now, as in the past, the way of life—daily life—is the American Indian religion, inseparable from life itself and from civic participation.

American Indians were once free to live their lives and practice their religions. But after Europeans came to North America, the Indians lost their freedom. They were declared savages, their homes and lands were taken forcibly, and their religions were suppressed as pagan. As Europeans moved west, more and more tribes experienced suppression of their traditional practices, of which their religion was an inherent part.

By the late 1800s, there were written regulations in the Bureau of Indian Affairs Court of Indian Offenses that prohibited the use of Indian languages, the practice of Indian ceremonies such as the sun dance, association with medicine men, and the practice of traditional medicine. Punishment ranged from withholding of rations for up to a month to imprisonment.

American Indians were finally given U.S. citizenship in 1924. This would seem to mean that all constitutional rights and responsibilities were extended to them. But they were not fully protected under the First Amendment and continued to be arrested for practicing their religions, including traveling to and maintaining sacred sites and using sacred objects.

The laws prohibiting the use of Indian languages and the practice of Indian religions were finally stricken from the books beginning with the Indian Reorganization Act of 1934. But by that time Big Foot and over 390 others had been killed at Wounded Knee, and countless others around the country had lost their lives for observing their traditions. They had been saturated with Christianity through missionaries, Indian agents, and boarding schools, where speaking Indian languages and practicing Indian religions continued to be banned. Denial of religious freedom for American Indians continued into the 1970s.

Student Handout 2

American Indian Freedom of Religion Act (1978)

Whereas the freedom of religion for all people is an inherent right, fundamental to the democratic structure of the United States and is guaranteed by the First Amendment of the United States Constitution;

Whereas the United States has traditionally rejected the concept of a government denying individuals the right to practice their religion and, as a result, has benefited from a rich variety of religious heritages in this country;

Whereas the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems;

Whereas the traditional American Indian religions, as an integral part of Indian life, are indispensable and irreplaceable;

Whereas the lack of a clear, comprehensive, and consistent Federal policy has often resulted in the abridgment of religious freedom for traditional American Indians;

Whereas such religious infringements result from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws;

Whereas such laws were designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious practices and, therefore, were passed without consideration of their effect on traditional American Indian religions;

Whereas such laws and policies often deny American Indians access to sacred sites required in their religions, including cemeteries;

Whereas such laws at times prohibit the use and possession of sacred objects necessary to the exercise of religious rights and ceremonies;

Whereas traditional American Indian ceremonies have been intruded upon, interfered with, and in a few instances banned; Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

Student Handout 3

American Indian Religious Freedom Since 1978

The American Indian Religious Freedom Act (AIFRA), providing numerous protections for American Indians, was passed after many years of work. But several lawsuits challenged its intent, and court decisions weakened its implementation. After only a few years, it has become apparent that the AIFRA is too vague and that it is inadequate to protect American Indian religious freedom.

Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980). In 1977 the Bureau of Land Reclamation completed the Glen Canyon Dam in southern Utah, creating a large recreational lake surrounding Rainbow Bridge National Monument, one of the Navajos' sacred religious sites. Navajo religious leaders sued federal officials, claiming a violation of the Establishment Clause. Among other problems, officials had licensed concessionaires to run boat services to the monument and to sell alcoholic beverages. The Navajo lost their lawsuit on appeal, with the Tenth Circuit Court stating that it could not establish Rainbow Bridge as a Native American religious monument as that would violate the Establishment Clause of the First Amendment. The circuit court supported the right of other citizens to low-cost electricity and rejected the notion of Navajo proprietorship. (A 1910 executive order had withdrawn Rainbow Bridge Monument from the Navajo Reservation without tribal consent or compensation.)

Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir. 1980). Two bands and several members of the Cherokee Nation lost on appeal to the Sixth Circuit to obtain an injunction against the completion of the Tellico Dam on the Little Tennessee River in southeastern Tennessee. They argued that the dam's flooding would violate their First Amendment rights by preventing access to their sacred birthplace, Chota, ancestral burial grounds, and a ceremonial area important for the collection of medicinal herbs. The Cherokee lacked a direct title to the area, but the circuit court found a proprietary interest unnecessary to their claim. It reasoned that the plaintiffs failed to prove that the geographical location was imperative to the practice of their religion.

Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988). The Supreme Court overturned a lower court ruling in a lawsuit brought by the Yurok, Karok, and Tolowa Tribes to bar the U.S. Forest Service from constructing a six-mile road near Chimney Rock in California and from authorizing logging in the surrounding area, which the tribe used for religious practices. The Court concluded that, while the government's proposed actions will have adverse effects on the practice of the tribes' religions, its activities did not prohibit the tribes from exercising their religious beliefs.

Employment Div. of Human Resources of Oregon v. Smith, 110 S.Ct. 1595 (1990). In Oregon, where using peyote is a felony, two American Indian employees of a private drug and alcohol abuse treatment agency with a policy prohibiting employee use of controlled substances were fired from their jobs and denied unemployment benefits after ingesting peyote at a Native American Church ceremony during off-duty hours. The Supreme Court upheld a lower court decision for refusal of benefits, reasoning that peyote's sacramental character could carry no weight against neutral laws passed by the state against criminal activities.

In 1994 two new acts introduced to Congress aimed to strengthen the protection of Native American religious freedom. They are H.R. 4230, an amendment to the AIFRA, and S. 2269, the Native American Cultural Protection and Free Exercise of Religion Act. H.R. 4230 is intended to protect the Indians' religious use of peyote by codifying the existing regulation of the Drug Enforcement Administration that protects such use and by making this applicable in all 50 states. (The religious use of peyote, while protected under the laws of 28 states, is a crime in 22, despite Drug Enforcement Agency exemptions for Native American Church members).

S. 2269 refines and supersedes the AIFRA, offering protection for Native American cultural and religious sites, Indians' religious use of peyote, the cultural and religious rights of Native American prisoners, and Native American cultural or religious uses of eagle feathers and other animals and plants.

H.R. 4230 passed the House and Senate with no opposition expressed, and President Clinton signed it into law on October 6, 1994. S. 2269 will be considered in the next congressional session.

Equal Protection and Sexual Orientation

A state constitutional amendment is enjoined for violating the Equal Protection Clause

Jean Dubofsky

In March 1992, the proposal that Amendment 2 be added to the Colorado Constitution made the state a battleground over gay rights. (See page 14 for the text of the amendment.) For a number of years, two local ordinances—in Aspen and Boulder—that protected gays and lesbians from discrimination in housing, employment, and public accommodations attracted little attention.

Then in 1991 Denver adopted a similar ordinance, and the state civil rights commission proposed adding protection for gays and lesbians to state law protections for other groups against discrimination in housing, employment, and public accommodations. At the same time, several fundamentalist religious organizations that had targeted homosexuality as a focal point for their organizing and fund raising made Colorado Springs their national headquarters.

CFV Promotes Amendment 2

Colorado for Family Values (CFV), the Colorado Springs organization that promoted Amendment 2, identified the local ordinances and the proposed amendment to the state civil-rights law as "special rights" for gays and lesbians. Playing on popular dislike of affirmative action programs, CFV warned Colorado voters that gays and lesbians would seek affirmative action programs to gain an advantage in employment and education. CFV also distributed campaign materials claiming that gays are responsible for most child molestations and that gays and lesbians influence children to become homosexuals.

Amendment 2, however, does more than repeal the local ordinances that provided redress for gays and lesbians who had experienced discrimination in housing, employment, or public accommodations. Adopted by the voters as part of the Colorado Constitution in November 1992, Amendment 2 deprives all branches of state government (the legislative, executive, and judicial), state agencies (including state universities and colleges), political subdivisions of the state (including counties), municipalities, and school districts of the power to remedy "*any* [emphasis added] claim of discrimination" based on "homosexual, lesbian or bisexual orientation."

The amendment repeals school district and university policies that permit students to seek redress for discrimination based on sexual orientation; the section of the Colorado Insurance Code that prohibits discrimination on the basis of sexual orientation in insurance underwriting practices (such as the refusal to write health or life insurance for persons who live in certain residential areas, who have certain occupations, or who designate a nonrelated individual as an insurance beneficiary); and state and local policies that prohibit government employment discrimination on the basis of sexual orientation. The amendment also prevents state courts from hearing claims of discrimination on the basis of sexual orientation.

Suit Claims Rights Violation

Shortly after the voters approved Amendment 2, the cities of Aspen, Boulder, and Denver, the Boulder Valley School District, and several gays and lesbians who had promoted the local gay-rights ordinances filed suit in state court to enjoin (prohibit) enforcement of the amendment. They argued that Amendment 2 violated their rights to equal protection of the laws and free speech under the U.S. Constitution.

At trial, the cities and the individual plaintiffs presented evidence that CFV's arguments about the need for Amendment 2 were untrue. For example, gays and lesbians have not sought affirmative action programs because they come from all economic levels in society, and, as a class, do not need affirmative assistance. Most child molestation cannot be attributed to gays; a pediatrician at Children's Hospital in Denver testified that most children who are sexually abused are assaulted by an unrelated heterosexual male who lives in their mother's home. And gays and lesbians do not influence children to become homosexual; sexual orientation is an inherited trait, so that children are not "influenced" to become gay or lesbian.

continued on page 15

Jean Dubofsky is an attorney in private practice in Boulder, Colorado.

Amendment 2 Time Line

977

November 28, 1977 The Aspen, Colorado, City Council adopts Ordinance No. 60, which prohibits discrimination in employment, housing, public services, and public accommodations within the city of Aspen. The ordinance is codified as part of the Aspen Municipal Code, and states that "*discriminate* or *to discriminate* means, without limitation, any act that because of race, color, creed, religion, ancestry, national origin, sex, age, marital status, physical handicaps, affectional or sexual orientation, family responsibility, or political affiliation, results in the unequal treatment or separation of any person, or denies, prevents, limits, or otherwise adversely affects the benefit or enjoyment by any person of employment, ownership or occupancy of real property, or public services or accommodations. Such discrimination is unlawful and is a violation of this section."

981

May 19, 1981 The City of Boulder, Colorado, amends its charter as the result of a citizens ballot initiative. The amended charter prohibits "discrimination against any individual because of the race, creed, color, sex, sexual orientation, marital status, religion, national origin, ancestry, pregnancy, parenthood, custody of a minor child, or mental or physical disability of such individual, such individual's friends or associates, or prospective occupants or tenants in the term, conditions, or privileges relating to obtaining or use of such financial assistance." The ordinance covers discrimination in housing, employment, and public accommodations.

91

February 1991 A similar ordinance is adopted by the Denver, Colorado, City Council and becomes part of that city's charter. It reads in part: "It is the intent of the council that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the city and to have an equal opportunity to participate in all aspects of life including but not limited to employment, housing and commercial space, public accommodations, education, and health and welfare services. It is the intent of the council in enacting this article to eliminate within the city discrimination by reason of race, color, religion, national origin, gender, age, sexual orientation, marital status, military status or physical or mental disability. Discriminatory practices as defined in this article may be subject to investigation, conciliation, administrative hearings and orders or other enforcement procedures."

92

March 1992 The requisite number of qualified voters submit to the Colorado secretary of state a petition to place the following proposed amendment to the Colorado Constitution on the ballot. It is known as Amendment 2.

NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis, or entitle any person or class of persons to have any claim of minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

November 3, 1992 Colorado voters pass the amendment proposed in March by a margin of 811,479 to 707,525 (53.4% to 46.6%). Immediately following the election, a coalition of individual Colorado citizens, local governments, and government and political subdivisions filed a complaint with the district court asking for Amendment 2 to be declared unconstitutional under both the U.S. and Colorado Constitutions, and requesting injunctive relief to prevent the constitutional change from taking effect on January 15, 1993. The plaintiffs included residents of Colorado and the Cities of Boulder, Aspen, and Denver; the City and County of Denver; the City of Boulder; the City of Aspen; the City Council of Aspen; and the Boulder Valley School District.

Source: Gayle Mertz, Safeguard Law-Related Education Program in Boulder, Colorado.

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Court Enjoins Enforcement

In 1993, The Denver district court enjoined enforcement of the amendment, and the Colorado Supreme Court upheld the district court's order. Both courts addressed only one of the plaintiffs' arguments: they ruled that Amendment 2 violates the Equal Protection Clause of the federal constitution because the amendment "fences out" gays, lesbians, and bisexuals from participation in the political process.

The legal precedents for the courts' ruling were cases that arose from attempts to roll back civil rights protections for African Americans in the 1960s. Realtors had proposed amendments that repealed state and local fair-housing laws and prevented future efforts by African Americans to obtain government protection from housing discrimination. The courts ruled that such measures denied African Americans the fundamental right to participate in the political process.

Amendment 2 is similar to the anti-fair housing measures because it eliminates the right of gays and lesbians to participate in the political process and seek protection not only from private discrimination in housing but also from discrimination in employment, public accommodations, and the sale of insurance—what CFV called "special rights." The courts overturned the amendment because what CFV promoted as eliminating "special rights" for gays, in fact, removed basic constitutional protections to which all Americans are entitled. The courts' ruling put a brake on efforts in other states to initiate similar constitutional amendments. ◆

Colorado Supreme Court Decisions

In 1993, ruling on the legality of the district court's injunction, the Colorado Supreme Court held that

[T]he Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process. . . . [A]ny legislation or state constitutional amendment which infringes on this right by "fencing out" an independently identifiable class of persons must be subject to strict judicial scrutiny. . . . [T]he right to participate equally in the political process is clearly affected by Amendment 2, because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation. Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of majority of the electorate through the adoption of a constitutional amendment. Rather than attempting to withdraw antidiscrimination issues as a whole from state and local control, Amendment 2 singles out one form of discrimination and removes its redress from consideration by the normal political process.

Source: Gayle Mertz, Safeguard Law-Related Education Program in Boulder, Colorado.

On October 11, 1994, the Colorado Supreme Court ruled further stating, in part, that

Amendment 2 targets this class of persons based on four characteristics: sexual orientation; conduct; practices; and relationships. Each characteristic provides a potentially different way of identifying that class of persons who are gay, lesbian, or bisexual. These four characteristics are not truly severable from one another because each provides nothing more than a different way of identifying the same class of persons. . . . States have no compelling interest in amending their constitution in ways that violate fundamental federal rights. . . . The state has failed to establish that Amendment 2 is necessary to serve any compelling governmental interest in a narrowly tailored way. Amendment 2 is not severable and not a valid exercise of state power under the Tenth Amendment. Accordingly, we affirm the trial court's entry of a permanent injunction barring its enforcement.

In December 1994, the Colorado attorney general's office asked the U.S. Supreme Court to review the Colorado Supreme Court's decision on Amendment 2, arguing that

the state's court's rejection of the amendment "went beyond the issue of sexual orientation" and undermines democracy.

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Teaching Strategy

Focus on Tolerance

Marilyn R. Cover

Background

Today, some commentators question whether there is a common set of principles or values that all Americans uphold, while others suggest that the true test of democracy is the ability to live together peaceably, despite dissimilar viewpoints, values, or lifestyles.

We all strive to find a personal level of comfort where we can express ourselves without the fear of being rejected or otherwise discriminated against. We are also called upon as a society to decide how tolerant we should or will be.

Tolerance is a fundamental part of democracy. Can the lessons we are teaching children transfer into greater respect and tolerance for diverse ideas? Can we provide models for finding a common ground?

This lesson will help students focus on tolerance as it applies to homosexuality, the creation of a classification based on homosexuality, and the appropriateness of putting such issues to a public vote.

Objectives

During this lesson, students will

- Formulate a definition for *tolerance* and rewrite it for students in their school
- Identify issues dealing with tolerance in their daily lives
- Review and discuss a proposed amendment to a state constitution
- Develop a response to potential conflict in their school

Marilyn R. Cover is the executive director of the Classroom Law Project, and an adjunct professor at Northwestern School of Law of Lewis and Clark College in Portland, Oregon.

Target Group: High school students (Note: Many middle school teachers find this subject matter difficult for their students.)

Time Needed: 1–2 class periods

Materials Needed: Student Handout

Resource People: A student involved in peer mediation and/or a state legislator or attorney knowledgeable about local laws relating to homosexuality

Procedures

1. Ask students to work in small groups to develop a definition of *tolerance.*
2. Locate references to *equality* in historical documents (e.g., Declaration of Independence, Gettysburg Address). Discuss these quotations in class.
3. (Arrange for resource people to be in your classroom to facilitate this procedure.) Discuss school situations in which students have not exhibited tolerance. How were the situations resolved? How should they have been resolved?
4. Explain to students that proposed solutions to conflicts resulting from intolerance are sometimes put to a public vote.
5. In dealing with controversial issues, students need guidance in approaching discussions, especially given the lack of consistent tolerant role models. Share the lesson objectives with students, and have them read the Student Handout and discuss it in small groups. Monitor these discussions to ensure that students focus on the amendment proposed in 1994 and its regulations—not on whether homosexuality is right or wrong.
6. Conduct a class discussion based on student responses to the discussion questions. Ask students which questions were most difficult and what additional information would have been helpful.
7. Inform students that Oregon's voters defeated the ballot measure.

Changes. . .

New Library Date **Our fall edition announced that the National Equal Justice Library's dedication was scheduled for Law Day, May 1, 1995, at Washington College of Law, The American University in Washington, D.C. This dedication has been rescheduled to early 1996, when the new law school building will be completed.**

Spring *Update* Index **The full *Update* index scheduled for publication in this edition will instead appear in the spring edition due for publication in April 1995.**

Student Handout

Oregon's Proposed Minority Status and Child Protection Act

Oregon's November 1994 ballot included the following measure: Shall the Oregon Constitution be amended to bar government from creating classifications based on homosexuality or spending public funds in a manner expressing approval of homosexuality? The amendment was titled "Minority Status and Child Protection Act."

Based on your reading of the text of the proposed amendment and your group discussion, answer these questions.

1. What would passage of the proposed amendment change?

2. This amendment was not considered by the Oregon State Legislature but put to a public vote. What are the advantages and disadvantages of asking citizens to vote on a law about a controversial issue?

3. Think back to your class discussion of tolerance. Does the proposed amendment foster tolerance?

4. Is the political arena the place to resolve conflict about homosexuality?

Proposed Amendment

Oregon's Proposed Minority Status and Child Protection Act specifically stated that governments would be prohibited from

a. creating classifications based on homosexuality

b. advising or teaching children, students, or employees that homosexuality equates legally or socially with race or other protected classifications

c. spending public funds in a manner promoting or expressing approval of homosexuality. Any government agency, department, or political unit would be prohibited from advising, instructing, or teaching children, students, and employees that homosexuality is the legal or social equivalent of race, color, religion, gender, age, or national origin.

d. granting spousal benefits or marital status based on homosexuality

The amendment would allow such actions as public libraries limiting access to books and materials about homosexuality, and it would allow a personnel action to be taken against public employees whose sexual behavior was alleged to disrupt the workplace.

Arguments For

1. Homosexuality is behavior of choice and not a cultural condition worthy of government recognition as are race, religion, and gender.
2. Without the amendment, children may be exposed to homosexuality in public schools and "recruited" into that lifestyle. Books such as *Heather Has Two Mommies* should be banned from public libraries.

Arguments Against

1. The Constitution does not recognize "minority status." The amendment discriminates and contradicts the section of the U.S. Constitution that promises equal protection for all people. Our society must be kept free of privileges or immunities for any group of people.
2. The amendment violates the First Amendment freedom of speech protection by requiring censorship of library materials, making some of them available only to adults and banning the use of public money to purchase new materials with homosexual themes.

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COUNTERPOINT...*from the trial bench*

We thank ***Judge Barry Loncke*** *for this response to Justice Earl Johnson's foreword in the fall 1994 "Equal Justice" edition. Judge Loncke is a municipal court judge with the Sacramento Superior and Municipal Courts in California and a member of the American Bar Association Special Committee on Youth Education for Citizenship.*

There is no doubt in my mind of the meritorious intent of Justice Earl Johnson, Jr.'s, foreword to the fall 1994 issue of *Update on Law-Related Education.* It was to inspire lawyers to support "justice for all" by providing legal services to those who cannot afford to pay. Justice Johnson has had significant experience in the area of providing legal services to the poor and understands the great need for the expansion of such services. I hope that his words inspired many attorneys to consider making significant increases in the amount of time they devote to pro bono representation.

However, as a trial court judge who has served for 13 years in the California court system, I was dismayed by Justice Johnson's bleak portrayal of America's courts to make his point: " . . . I can now assure you from personal experience that no one can hope to get justice in America's courts unless they have a lawyer to represent them. . . . Those without lawyers, and there are many, don't stand a chance." This unrestrained hyperbole must not go unchallenged, however worthwhile its purpose.

To the extent that lawyers and judges subscribe to an elitist, exclusionary view of the nature and function of our courts, there is a real danger that what I have termed *hyperbole* will become reality. Professionals who are uncomfortable with lay people representing themselves in court may allow bias to obscure justice.

The lack of "lawyers for all" is not the only reason that justice is such an elusive goal. Judicial attitudes may play an important role in making "justice for all" more difficult to achieve than it should be. For example, in California during 1994, a trial court consolidation measure was opposed by a significant minority of trial and appellate judges on the grounds that "good lawyers from prominent law schools with significant practices would not be as willing to serve as trial court judges if they might have to preside over some (or any) less significant cases." Likewise, sitting judges did not want to contemplate devoting any of their time or talent to such cases. Thus, cases in which the monetary amount or issue involved is unimportant by law firm or academic standards, but greatly significant to the consumer, tenant, or other poor or middle-income litigant, were viewed as being beneath the dignity of "an important trial judge." It is no surprise to me that justice is unlikely to be achieved in the courts of judges who hold the problems of the average person in such contempt.

Despite the attitude of some, there are hundreds of judges in California's court system who regularly see to it that justice is afforded to litigants without lawyers. The vast majority of trial judges here have seen, and participated in, justice being achieved by unrepresented nonlawyers who have appeared in California's courtrooms. I believe that the story is similar throughout the United States. In many cases, the judge's job would be easier if lawyers represented both sides, but nonlawyers do not inevitably lose. Certainly, the more complex the case, the more helpful and even necessary a lawyer is. Most cases, however, are fact driven; and judges have a major role in assuring that truth is ascertained and justice achieved. In fact, many good, caring lawyers turn down significant retainers and advise potential clients to represent themselves when the anticipated fee is not justified by the expected result, and when they believe the party can adequately handle the case in court and achieve justice.

Given an expanding availability of alternative dispute resolution techniques throughout the country, and a significant increase in the willingness of members of the bar to assure "justice for all" by providing free (or reduced fee) legal services to poor and middle-income people, it would be possible to increase both the availability and the appearance of justice in our nation. For this reason, I applaud the efforts of Justice Johnson to inspire action on the part of attorneys.

It isn't often that a judge of an "inferior" trial court comments on the opinion of an appellate court justice. However, I suspect that Justice Johnson would be disappointed if his foreword did not provoke a response from the trial bench. His challenge to lawyers to commit themselves to the continuing pursuit of "equal justice for all" should also inspire judges, as it has inspired me, to redouble efforts to combat judicial elitism and to assure that "justice for all"—including unrepresented nonlawyers—is achieved in courtrooms throughout this nation. ◆

Harrison Bergeron

A short story exploring concepts of equality

Kurt Vonnegut

The year was 2081, and everybody was finally equal. They weren't only equal before God and the law. They were equal every which way. Nobody was smarter than anybody else. Nobody was better looking than anybody else. Nobody was stronger or quicker than anybody else. All this equality was due to the 211th, 212th, and 213th Amendments to the Constitution, and to the unceasing vigilance of agents of the United States Handicapper General.

Some things about living still weren't quite right, though. April, for instance, still drove people crazy by not being springtime. And it was in that clammy month that the H-G men took George and Hazel Bergeron's fourteen-year-old son, Harrison, away.

It was tragic, all right, but George and Hazel couldn't think about it very hard. Hazel had a perfectly average intelligence, which meant she couldn't think about anything except in short bursts. And George, while his intelligence was way above normal, had a little mental handicap radio in his ear. He was required by law to wear it at all times. It was tuned to a government transmitter. Every 20 seconds or so, the transmitter would send out some sharp noise to keep people like George from taking unfair advantage of their brains.

George and Hazel were watching television. There were tears on Hazel's cheeks, but she'd forgotten for the moment what they were about.

On the television screen were ballerinas.

A buzzer sounded in George's head. His thoughts fled in panic, like bandits from a burglar alarm.

"That was a real pretty dance, that dance they just did," said Hazel.

"Huh?" said George.

"That dance—it was nice," said Hazel.

"Yup," said George. He tried to think a little about the ballerinas. They weren't really very good—no better than anybody else would have been, anyway. They were burdened with sashweights and bags of birdshot, and their faces were masked, so that no one, seeing a free and graceful gesture or a pretty face, would feel like something the cat drug in. George was toying with the vague notion that maybe dancers shouldn't be handicapped. But he didn't get very far with it before another noise in his ear radio scattered his thoughts.

George winced. So did two out of the eight ballerinas.

Hazel saw him wince. Having no mental handicap herself, she had to ask George what the latest sound had been.

"Sounded like somebody hitting a milk bottle with a ball peen hammer," said George.

"I'd think it would be real interesting, hearing all the different sounds," said Hazel, a little envious. "All the things they think up."

"Um," said George.

"Only, if I was Handicapper General, you know what I would do?" said Hazel. Hazel, as a matter of fact, bore a strong resemblance to the Handicapper General, a woman named Diana Moon Glampers. "If I was Diana Moon Glampers," said Hazel, "I'd have chimes on Sunday—just chimes. Kind of in honor of religion."

"I could think, if it was just chimes," said George.

"Well—maybe make 'em real loud," said Hazel. "I think I'd make a good Handicapper General."

"Good as anybody else," said George.

"Who knows better'n I do what normal is?" said Hazel.

"Right," said George. He began to think glimmeringly about his abnormal son who was now in jail, about Harrison, but a 21-gun salute in his head stopped that.

"Boy!" said Hazel. "That was a doozy, wasn't it?"

It was such a doozy that George was white and trembling, and tears stood on the rims of his red eyes. Two of the eight ballerinas had collapsed to the studio floor, were holding their temples.

"All of a sudden you look so tired," said Hazel. "Why don't you stretch out on the sofa, so's you can rest your handicap bag on the pillows, honeybunch." She was referring to the 47 pounds of birdshot in a canvas bag, which was padlocked around George's neck. "Go on and

"Harrison Bergeron" by Kurt Vonnegut, from WELCOME TO THE MONKEY HOUSE by Kurt Vonnegut, Jr. Copyright © 1961 by Kurt Vonnegut, Jr. Used by permission of Delacorte Press/Seymour Lawrence, a division of Bantam Doubleday Dell Publishing Group, Inc.

rest the bag for a little while," she said. "I don't care if you're not equal to me for a while."

George weighed the bag with his hands. "I don't mind it," he said. "I don't notice it any more. It's just a part of me."

"You been so tired lately—kind of wore out," said Hazel. "If there was just some way we could make a little hole in the bottom of the bag, and just take out a few of them lead balls. Just a few."

"Two years in prison and $2,000 fine for every ball I took out," said George." I don't call that a bargain."

"If you could just take a few out when you came home from work," said Hazel. "I mean—you don't compete with anybody around here. You just set around."

"If I tried to get away with it," said George, "then other people'd get away with it—and pretty soon we'd be right back to the dark ages again, with everybody competing against everybody else. You wouldn't like that, would you?"

"I'd hate it," said Hazel.

"There you are," said George. "The minute people start cheating on laws, what do you think happens to society?"

If Hazel hadn't been able to come up with an answer to this question, George couldn't have supplied one. A siren was going off in his head.

"Reckon it'd fall all apart," said Hazel.

"What would?" said George blankly.

"Society," said Hazel uncertainly. "Wasn't that what you just said?"

"Who knows?" said George.

The television program was suddenly interrupted for a news bulletin. It wasn't clear at first as to what the bulletin was about, since the announcer, like all announcers, had a serious speech impediment. For about half a minute, and in a state of high excitement, the announcer tried to say, "Ladies and gentlemen—"

He finally gave up, handed the bulletin to a ballerina to read.

"That's all right—" Hazel said of the announcer, "he tried. That's the big thing. He tried to do the best he could with what God gave him. He should get a nice raise for trying so hard."

"Ladies and gentlemen—" said the ballerina, reading the bulletin. She must have been extraordinarily beautiful, because the mask she wore was hideous. And it was easy to see that she was the strongest and most graceful of all the dancers, for her handicap bags were as big as those worn by 200-pound men.

And she had to apologize at once for her voice, which was a very unfair voice for a woman to use. Her voice was a warm, luminous, timeless melody. "Excuse me—" she said, and she began again, making her voice absolutely uncompetitive.

"Harrison Bergeron, age 14," she said in a grackle squawk, "has just escaped from jail, where he was held on suspicion of plotting to overthrow the government. He is a genius and an athlete, is under-handicapped, and should be regarded as extremely dangerous."

A police photograph of Harrison Bergeron was flashed on the screen—upside down, then sideways, upside down again, then right side up. The picture showed the full length of Harrison against a background calibrated in feet and inches. He was exactly seven feet tall.

The rest of Harrison's appearance was Halloween and hardware. Nobody had ever borne heavier handicaps. He had outgrown hindrances faster than the H-G men could think them up. Instead of a little ear radio for a mental handicap, he wore a tremendous pair of earphones, and spectacles with thick wavy lenses. The spectacles were intended to make him not only half blind, but to give him whanging headaches besides.

Scrap metal was hung all over him. Ordinarily, there was a certain symmetry, a military neatness to the handicaps issued to strong people, but Harrison looked like a walking junkyard. In the race of life, Harrison carried 300 pounds.

And to offset his good looks, the H-G men required that he wear at all times a red rubber ball for a nose, keep his eyebrows shaved off, and cover his even white teeth with black caps at snaggle-tooth random.

"If you see this boy," said the ballerina, "do not—I repeat, do not—try to reason with him."

There was the shriek of a door being torn from its hinges.

Screams and barking cries of consternation came from the television set. The photograph of Harrison Bergeron on the screen jumped again and again, as though dancing to the tune of an earthquake.

George Bergeron correctly identified the earthquake, and well he might have—for many was the time his own home had danced to the same crashing tune. "My god—" said George, "that must be Harrison!"

The realization was blasted from his mind instantly by the sound of an automobile collision in his head.

When George could open his eyes again the photograph of Harrison was gone. A living, breathing Harrison filled the screen.

Clanking, clownish, and huge, Harrison stood in the center of the studio. The knob of the uprooted studio door was still in his hand. Ballerinas, technicians, musicians, and announcers cowered on their knees before him, expecting to die.

"I am the Emperor!" cried Harrison. "Do you hear? I am the Emperor! Everybody must do what I say at once!"' He stamped his foot and the studio shook.

"Even as I stand here—" he bellowed, "crippled, hobbled, sickened—I am a greater ruler than any man who ever lived! Now watch me become what I can become!"

Harrison tore the straps of his handicap harness like wet tissue paper, tore straps guaranteed to support 5,000 pounds.

Harrison's scrap-iron handicaps crashed to the floor.

Harrison thrust his thumbs under the bar of the padlock that secured his head harness. The bar snapped like celery. Harrison smashed his headphones and spectacles against the wall.

He flung away his rubber-ball nose, revealed a man that would have awed Thor, the god of thunder.

"I shall now select my Empress!" he said, looking down on the cowering people." "Let the first woman who dares rise to her feet claim her mate and her throne!"

A moment passed, and then a ballerina arose, swaying like a willow.

Harrison plucked the mental handicap from her ear, snapped off her physical handicaps with marvelous delicacy. Last of all, he removed her mask.

She was blindingly beautiful.

"Now—" said Harrison, taking her hand, "shall we show the people the meaning of the word dance? Music!" he commanded.

The musicians scrambled back into their chairs, and Harrison stripped them of their handicaps, too. "Play your best," he told them, "and I'll make you barons and dukes and earls."

The music began. It was normal at first—cheap, silly, false. But Harrison snatched two musicians from their chairs, waved them like batons as he sang the music as he wanted it played. He slammed them back onto their chairs.

The music began again and was much improved.

Harrison and his Empress merely listened to the music for a while—listened gravely, as though synchronizing their heartbeats with it.

They shifted their weights to their toes.

Harrison placed his big hands on the girl's tiny waist, letting her sense the weightlessness that would soon be hers.

And then, in an explosion of joy and grace, into the air they sprang!

Not only were the laws of the land abandoned, but the law of gravity and the laws of motion as well.

They reeled, whirled, swiveled, flounced, capered, gamboled, and spun.

They leaped like deer on the moon.

The studio ceiling was 30 feet high, but each leap brought the dancers nearer to it.

It became their obvious intention to kiss the ceiling.

They kissed it.

And then, neutralizing gravity with love and pure will, they remained suspended in air inches below the ceiling, and they kissed each other for a long, long time.

It was then that Diana Moon Glampers, the Handicapper General, came into the studio with a double-barreled 10-guage shotgun. She fired twice, and the Emperor and the Empress were dead before they hit the floor.

Diana Moon Glampers loaded the gun again. She aimed at the musicians and told them they had 10 seconds to get their handicaps back on.

It was then that the Bergerons' television tube burned out.

Hazel turned to comment about the blackout to George. But George had gone out into the kitchen for a can of beer.

George came back in with the beer, paused while a handicap signal shook him up. And then he sat down again. "You been crying?" he said to Hazel.

"Yup," she said.

"What about?" he said.

"I forget," she said. "Something real sad on television."

"What was it?" he said.

"It's all kind of mixed up in my mind," said Hazel.

"Forget sad things," said George.

"I always do," said Hazel.

"That's my girl," said George. He winced. There was the sound of a riveting gun in his head.

"Gee—I could tell that one was a doozy," said Hazel.

"You can say that again," said George.

"Gee—" said Hazel, "I could tell that one was a doozy." ◆

Teaching Strategy

Equal and Equitable: What's the Difference?

Helene Willis

> **Men are born equal, but they are also born different.**
>
> —*Erich Fromm,*
> Escape from Freedom

Background

"All men are created equal." So states the U.S. Declaration of Independence. These five simple words are the essence of our democracy. But what of our forebears' meaning and intention when they crafted that sentence? The debate continues, and individual interpretations create misunderstandings as well as shared meanings daily in both our personal and professional lives.

Today, the issue of diversity is very real. In our schools, the term is broadly and generally defined as an educational goal. Students hear *diversity* along with *equal, equally, equality, equitably,* and *equity.* They use these terms indiscriminately in a myriad of situations, trying to make sense of the bigger picture. What is the relationship between the concepts of "equal" and "equitable"? Where do they fit into our everyday world?

Very young students learn to measure fairness with things being equal: "She got more candy than me. That's not fair!" for example. By adolescence, this idea has become more sophisticated: "He gets to stay out later than I do. That's not fair! We're all created equal, aren't we?" Teenagers hear their teachers and parents say, "We want our decision to be equitable for both/all of you." But frequently the decision, while fair, all things considered, is not equal, so that hard feelings, anger, and resentment result—all because students do not understand the difference between *equal* and *equitable. Equal* means "the same as; alike in quantity, degree, value; same in rank, ability, merit," while *equitable* means "fair" or "impartial."

Sometimes, students can develop deeper understandings by taking a concept to the outer limits of its literal meaning through rich discussions and experiences. As the concept's meaning deepens for students, they transfer their understanding to other issues in the larger context, and the concept takes on greater and more constructive significance. The fundamental premise "All men are created equal" can be approached in this way. Having a clear working definition of *equal* and *equitable* will provide students with greater insight into the concept of diversity and the issues inherent to it.

Literature is one of the more effective ways of making a point. Everyone loves a good story. From birth, we are told or read stories that help us learn about ourselves, friendship, history, our world, and other worlds and cultures. Stories are a deep part of who we are as individuals. Even in this information age, we tend to listen more closely to information in story form, with basic narrative elements such as theme, mood, setting, problem, plot, characters, and resolution. News broadcasters know this, for they routinely announce, "We'll be right back with that story following this commercial break." Stories are an integral part of our lives.

In school, teachers have used stories in their classrooms for decades, but it has been only within the past 10 to 15 years that teachers, particularly at the secondary level, have discovered the power of literature as a major teaching tool for both introducing and revisiting important issues in virtually all curriculum areas, not just in English. This teaching strategy will use a contemporary short story to accomplish various learning objectives.

In keeping with reader-response theory, and to stimulate and facilitate richer, deeper thinking and conversation among students, the recommended discussions and activities are open ended. "...[G]enuine meaning, meaning over which readers have ownership, arises only if those readers are able to structure it themselves, through their own interpretations, in the light of their experiences and their intent" (Peterson & Eeds 16).

Objectives

As a result of this lesson, students will

- know the difference between the concepts of *equal* and *equitable*
- better understand the possible ramifications of legal interpretation when it is taken to its literal limits
- be aware of how to interpret societal trends and predict possible future outcomes
- be able to apply new learnings to current diversity issues as manifested in their schools

Target Group: Middle school students
Time Needed: 5–10 class periods

Helene Willis is a retired curriculum specialist from Boulder Valley School District in Boulder, Colorado. A past director of the Regis University Master of Arts in Whole Learning Education program in Denver, Colorado, Ms. Willis is currently an educational curriculum consultant.

Material Needed:
"Harrison Bergeron," by Kurt Vonnegut, Jr. (See page 19.)

Teaching Approaches

1. Defining *Equal* and *Equitable*

If necessary to first determine students' understanding of *equal* and *equitable*, have the class do one or two of these activities.

a. Ask each student to write a definition of each term, pair up with a partner, compare definitions, and write definitions satisfactory to both. Then have pairs team up in groups of four to share their revised definitions and formulate new ones, which they will write on large chart paper and tape to the wall. After all definitions have been shared with the entire class, facilitate a class discussion about how all the definitions for each term can be synthesized into one. Have the class do so, and use these two definitions as a framework for the continuing lesson.

   Do not correct misconceptions and erroneous definitions. By the end of the lesson, which has evaluative as well as diagnostic aspects, students will have revisited and revised the definitions as necessary, based on what they have learned throughout the process.

b. Divide the class into groups of four. Have each group improvise a scene demonstrating the meanings of *equal* and *equitable*. Give no more than five minutes for preparation. Debrief each skit with the entire class. Have each group write down what definitions were demonstrated. Repeat the activity at the end of the lesson and note any changes.

c. Have students illustrate their understanding of *equal* and *equitable* and share them with the class.

d. Have each student find an example of each term in a literature selection he or she has read.

2. Exploring the Statement

Prior to hearing the short story, students will need some experience with the statement "All men are created equal," primarily to gain an understanding of how individual interpretations of the phrase differ. The activity's outcome will be shared meanings, focused on the interpretive continuum from literal to subjective. Select one of these activities to accomplish this objective.

a. Put the statement on the chalkboard or a bulletin board. Have students go on a hunt to find the text where it appears. Make a copy of the Declaration of Rights from the Declaration of Independence, once this document has been identified as the source document. Enlarge the copy and have a student highlight the statement. Put the copy on a bulletin board.

b. Divide students into groups of three or four. Have them devise questions they would ask the signers of the Declaration of Independence if they were alive. Compile the questions into a master list. As a facilitator and class member, you may contribute questions to the list, such as these: What, if any, influence does this statement have on the laws of our nation? What was the signers' intent? Have interpretations changed over the years since the Declaration of Independence was written? If so, why and how? (Give examples.) What is the literal meaning? How does literal differ from subjective?

   Have students devise ways for finding "answers" to questions on the list after they have discussed and shared their personal opinions. Each group may choose a strategy and then follow through, reporting back when done. (One strategy may be to interview a number of people on one or more questions and compile the information into a statistical report to be used later for making predictions, identifying trends, and measuring societal attitudes and perceptions.)

c. Divide students into groups, and have each group improvise a skit demonstrating its interpretation of the phrase. Debrief with the whole class following each skit.

d. Have students individually record their interpretations.

3. Reading "Harrison Bergeron"

For the greatest impact, read aloud to the class the short story "Harrison Bergeron." Have each student write a reaction to the story. Call on volunteers to share their reactions. Ask each student to write one to three questions, issues, or ideas that come to mind and that would lead to a rich group discussion. Get one question from each student; any overlap is fine.

Questions the teacher might contribute include: What does this story illustrate about the rules and laws we live by? How like fiction is this story in today's context? How can we ensure reasonable, consistent interpretation of our laws over time—or can we? If all people are equal in this story, how is it that there is a handicapper general who is obviously not equal to everyone else? How would this story change if she were as "equal" as the others?

Decide as a class which five or six questions, issues, and/or ideas are the most interesting and most apt to lead to rich discussions. Have each student select the one that he or she wishes to discuss. Divide the class into discussion groups according to students' choices. Have students conduct their discussions, and afterward have one member of each group report significant points to the class. There may be one or more topics that students want to pursue further as an entire class.

4. Rewriting Source Documents
Have students substitute *equitably* in the Declaration of Rights. Ask how it reads now. Have students rewrite the short story to the outer limits of the literal interpretation of that statement. The rewrite may be in any genre, including essay, poetry, drama, or newspaper or magazine article. Have students share their rewrites and analyze the differences.

5. Observing School Trends
Have students identify school rule or policy issues that involve interpretations of *equal* and *equitable*, looking for trends that might suggest a movement toward extremes. Have the class write recommendations for ensuring that all school community members, however diverse, will be treated equitably.

6. Using a Resource Person
Invite an attorney to your classroom to discuss how various laws are based on the premise, "All men are created equal." Have him or her discuss particular cases in which interpretations of *equal* and/or *equitably* were fundamental to the outcome.

Reference Peterson, Ralph L., and Maryann Eeds. *Grand Conversations: Literature Groups in Action*. New York: Scholastic, 1990.

Extensions

Language Arts

1. Either conduct a debate about the intent of the phrase "All men are created equal" or have students interview other students who portray themselves as authors of the Declaration of Rights.
2. Have students look for the words *equal* (*equality, equally*) and *equitable* (*equity, equitably*) in everyday usage, such as in *home equity* or *equal opportunity employer*. Discuss what these and other phrases mean in light of students' understandings of the words.
3. Ask students to compare the phrase "All men are created equal" with the wording and spirit of the Bill of Rights.
4. Have students select a proposed or existing law and write a story illustrating what might happen if that law is taken to its literal extreme.
5. Have students rewrite Kurt Vonnegut's story as a play and perform it for the school. Add a narrator who comments on extremes.

Literature

1. There is a wealth of literature that speaks to issues involving equality and equity and the ramifications of taking a given law or rule to its extreme. One of the most provocative is *The Giver* by Lois Lowry. This is an excellent book for the class to read and compare to the short story in the lesson. Current practices in our society that reflect what is happening in the book can lead to discussion on trends and predictions for the future, ideas for change, and involvement as a citizen of our nation and the world community.
2. Use your school library to help your class explore science fiction. After students have reread some of the classics, ask them if any of the authors' predictions have come true.
3. Have students search in picture books, short stories, poems, essays, novels, magazines, newspapers, and other journals for examples of laws that might have been "stretched."

Game

Develop and play simulation and/or board games based on what students have learned.

Librarian's Choice by Judith Volc

Titles especially suitable for preadolescents who wish to learn more about the topics covered in this issue.

American Heroes In and Out of School by Nat Hentoff. Delacorte 1987.
Goody Sherman's Pig by Mary Blount Christian. Collier Macmillan 1991.
The Great Skinner Strike by Stephanie S. Tolan. MacMillan 1983.
I Am Not a Short Adult: Getting Good at Being a Kid by Marilyn Burns. Little, Brown 1977.
It Is Illegal to Quack like a Duck and Other Freaky Laws by Barbara Seuling. Lodestar 1988.
Kids in Court: The ACLU Defends Their Rights by Sam & Beryl Epstein. Four Winds 1982.
A Long Way to Go by Zibby O'Neal. Viking 1990.
My Name Is Lion by Margaret Embry. Holiday 1970.
Oliver Button Is a Sissy by Tomie DePaola. Harcourt 1979.
The Real Me by Betty Miles. Knopf 1974.
Under 18: Knowing Your Rights by Michael Kronenwetor. Enslow 1993.
You and the Law by Jules Archer. Harcourt, Brace 1978.
You Can't Eat Peanuts in Church and Other Little-Known Laws by Barbara Seuling. Doubleday 1975.
Series: *Judge and Jury* by Doreen Rappaport. HarperCollins. With titles:
  The Alger Hiss Trial. 1993.
  The Lizzie Borden Trial. 1992.
  The Sacco-Vanzetti Trial. 1994.
  Tinker vs. Des Moines: Student Rights on Trial. 1993.

Judith Volc is the coordinator of Children's Services for the Boulder Public Library in Boulder, Colorado.

Minority Inclusion Programs

A review of affirmative action in government contracting and electoral arrangements

M. David Gelfand

The United States has a long, sad history of discrimination against minority group members, especially in the areas of employment and the electoral franchise. Modern attempts to include racial minority group members and women in the political and economic processes of American society have taken a variety of forms. The early programs sought to outlaw overt discrimination; later programs have taken additional, often controversial, steps, sometimes including "race-conscious" remedies.

Affirmative Action Programs

Early in this century, many employers posted signs reading "No Irish need apply." Later, universities still set quotas on the number of Jews who could be admitted; and, until the 1960s, African Americans were excluded from many universities. Patterns of direct and indirect discrimination severely restricted the number of women and minority group members who could enter higher-status, better-paying professions or attain higher-level management positions in most companies. Several statutes and executive orders were adopted outlawing employment discrimination on the basis of race, gender, or national origin. Given the history and continuing effects of racial discrimination, however, many policymakers believed that additional actions were needed to provide specific advantages for minority group members—in university admissions, government employment, and other areas. Programs of this nature, which take various forms, are generally referred to as "affirmative action" programs.

M. David Gelfand is the Ashton Phelps Professor of Constitutional Law at Tulane Law School in New Orleans, Louisiana. He has served as attorney, advisor, independent expert witness, and special master in a variety of voting rights cases around the country. Professor Gelfand has helped to develop minority inclusion programs for government contracting and employment.

These programs are based upon two fundamental assumptions. The first is that racial minority group members and women would today be in a different position, in terms of power and influence, if they had not been subjected to discrimination in the past. The second is that government (or private companies or society as a whole) should, in some manner, take responsibility for removing the continuing effects of this prior discrimination. Affirmative action employment programs have often met stiff opposition, especially from those who believe that these programs constitute a form of "reverse discrimination" against white men.

Government Employment and Contracting

Most forms of overt employment discrimination against women and minorities have been outlawed by federal and state antidiscrimination laws, especially Title VII of the federal Civil Rights Act of 1964. Yet more subtle forms of discrimination sometimes prevent women from attaining top management positions, financial barriers still face minority-owned businesses, and income and wealth differences between men and women and between African Americans and whites persist.

The U.S. Supreme Court has placed severe constraints upon certain types of affirmative action programs—those that "set aside" jobs for minority employees or contracts for minority-owned businesses—when such programs are adopted by state or local governments. For example, *City of Richmond v. J. A. Croson*, 488 U.S. 469 (1989), holds that state or local governments may implement minority set-asides, and other aggressive affirmative action programs may be adopted, only if there has been a demonstrated history of discrimination against minorities and/or women by the enacting governmental entity. Past discrimination can be established, for example, by an authoritative decision (e.g., a federal court ruling that the police department's employment test discriminates against women).

In the absence of such an authoritative determination, past discrimination can be proven through an elaborate, often expensive, disparity study. *Disparity studies* compare, over time, the difference between the "availability" of particular types of minority-owned businesses (how many exist in the area) and their "utilization" (the extent to which they have received contracts from the relevant government). The data must be quite specific—in terms of the minority groups covered, the type of work involved (e.g., construction, professional services), and the locality involved. Even without a judicial ruling or disparity study, a local government may adopt race-neutral measures to help disadvantaged businesses (e.g., technical assistance, subsidies for construction loans or bonds). A *race-neutral measure* is a law of general application not intended to prefer any group.

In contrast to *Croson's* very strict approach to local government minority-inclusion programs, the Supreme Court has generally deferred to determinations made by congressional and federal agencies regarding the existence of and remedies for past discrimination. A pending case seeks to challenge that traditional difference. See *Adarand Constructors, Inc. v. Pena,* 16 F.3d 1537 (10th Cir. 1994), *cert. granted,* 62 U.S.L.W. 3809 (Sept. 26, 1994) (No. 93-1841).

Voting and Elections

In the early days of the American Republic, only white men who owned a certain amount of property were allowed to vote. Several constitutional amendments and statutes extending the franchise to women and to racial and language minorities have been adopted as a result of struggles in the

"Official English" Only?

by Christopher Kopecky

Whether English should be the official language of the United States has been a hotly debated issue since 1981, when an amendment to the U.S. Constitution was first proposed to make English the official language of government. Since that time, supporters of Official English have had little success on the federal level. They have, however, been more successful in their efforts to persuade state governments to make English their official language. As of 1990, 17 states had either ratified amendments or passed legislation making English the official language in those states (Crawford 2). The amendments and legislation vary, but they are generally aimed at eliminating bilingual education programs, social services programs, and government documents printed in any languages other than English.

In December, the Ninth U.S. Circuit Court of Appeals in San Francisco ruled that Arizona's "Official English" law is unconstitutional.

For English Only

Supporters of Official English see an official national language as necessary to promote assimilation and Americanization of new immigrants. They argue that if we do not have an official language, our unity will be threatened by groups of unassimilated foreign immigrants who refuse to give up their native tongues. At the core, they are opposed not only to the government's use of foreign languages, but also to the increasing government acceptance of cultural differences among ethnic groups—particularly what they see as government accommodation of Hispanic immigrants. As Senator S. I. Hayakawa, sponsor of the original federal Official English amendment, has written, "The aggressive movement on the part of Hispanics to seek to maintain—and give official status to—a foreign language within our borders is an unhealthy development.... One official language and one only, so that we can unite as a nation." (Hayakawa 100)

Christopher Kopecky is a free-lance writer in Springfield, Illinois.

Against English Only

Opponents of Official English see the campaign for state-endorsed official language provisions as nothing more than a current expression of nativism and fear. They point out that, throughout American history, the nation has successfully assimilated much larger numbers of foreign-born and non-English-speaking immigrants than those presently in the country. All these earlier immigrants were assimilated into American society without the country designating an official language. It is likely, they argue, that in time economic and social necessity will force new immigrants to acquire the English language, and they will be incorporated into the mainstream of American society as previous immigrants have been. In the meantime, Official English provisions serve to deny immigrants access to services and meaningful electoral participation.

For those students interested in reading more about this fascinating and lively debate, an excellent starting point is *Language Loyalties: A Source Book on the Official English Controversy,* edited by James Crawford. The book contains essays representing all sides of the contemporary debate, along with essays that give historical and international perspectives on our current language controversy. For a more partisan source opposing Official English on the grounds that it appeals to nativism and contradicts our own history of multilingualism, students can read Juan F. Perea's article "Demography and Distrust: An Essay on American Language, Cultural Pluralism, and Official English" in the *Minnesota Law Review* 77 (December 1992): 269–373.

References

Crawford, James. Editor's introduction to *Language Loyalties: A Source Book on the Official English Controversy.* Chicago: University of Chicago Press, 1992.

Hayakawa, S. I. "The Case for Official English." *In Language Loyalties.*

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streets, courts, Congress, and state legislatures. Also, judicial decisions have invalidated various devices (e.g., poll taxes, literacy tests) that created additional barriers to voter registration. Modern cases go further, by challenging the structure and racial composition of election districts.

Various amendments to the U.S. Constitution forbid absolute barriers to voting based upon race (Fifteenth Amendment, ratified 1870), gender (Nineteenth Amendment, ratified 1920), or age for adults (in 1971, the Twenty-sixth Amendment set 18 as the minimum voting age). A variety of devices that were employed in Southern states to prevent African Americans from registering, such as poll taxes, "white primaries," and literacy tests, have also been outlawed. In addition, Supreme Court decisions in the late 1960s and early 1970s eliminated most, but not all, property-ownership requirements and durational residency requirements (which had required potential voters to reside in the area for a specified time before registering). Many states have adopted legislation facilitating registration and voting by persons with physical disabilities, the homeless, and others.

During the last 12 years, a wide array of lawsuits, based upon the Voting Rights Act of 1965 (as amended in 1982) and the Equal Protection Clause of the Fourteenth Amendment, has challenged electoral arrangements that result in "vote dilution." In general, these lawsuits claim that the traditional electoral arrangements *dilute* (make less effective) the votes of racial minorities, when compared to the votes of the white majority. For example, in "at-large" elections, an entire city is used as a single election district, and usually a candidate must receive a majority of the votes from the entire city in order to be elected (a "majority vote" requirement). It is often difficult (and sometimes impossible) for members of a geographically concentrated racial minority to elect candidates of their choice in such city elections. Challenges to this type of vote dilution have been based upon the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment. Such challenges have often resulted in court-ordered districting or redistricting. (See the fall 1994 edition of *Update on the Courts*, pp. 5–10, for a case analysis and a teaching strategy regarding voting rights and redistricting.)

The Supreme Court has long required that all congressional election districts within a state must have nearly identical populations, based upon the latest decennial census. Therefore, prior to the 1992 elections, most state legislatures had to redraw their congressional (as well as their state legislative) districts in light of the 1990 census figures. At that time, it was also widely believed that *Thornburg v. Gingles*, 478 U.S. 30 (1986), and several lower court cases required districting or redistricting to increase minority participation and voter strength, by drawing African-American or Hispanic-American majority districts wherever possible. In several states (e.g., Florida), such race-conscious districting resulted in the election of the first African American from that state to the U.S. Congress.

Today, various lawsuits have challenged several of those districts drawn in 1992 (e.g., North Carolina, Louisiana), and some cases raise questions about the appropriate role of the various players—state legislatures, the U.S. Justice Department, and the federal courts—in the redistricting process. See generally *Shaw v. Reno*, 113 S.Ct. 2816 (1993). Some commentators have suggested alternative voting arrangements, such as cumulative voting, rather than redistricting to remedy past discrimination in electoral arrangements. (For a closer look at cumulative voting issues, see page 38.)

Conclusions

The histories of the two types of minority inclusion programs discussed here—employment remedies and electoral remedies—are different in important ways, yet these programs sometimes may be directly linked. For example, city councils that include racial minority group members are more likely to adopt minority inclusion programs in employment and other fields. Also, they may be more willing to forbid prior discriminatory practices.

For example, Dade County, Florida, was long governed by a county commission composed primarily of white commissioners elected on an at-large basis. In a 1992 suit based upon the Voting Rights Act, *Meek v. Metropolitan Dade County* (Case #86-1820-CIV-GRAHAM), a federal court required the Dade County Commission to create electoral districts that would more accurately reflect the demographic makeup of the county. A new commission was elected in 1993 from the resulting 13 new districts—3 with African-American majorities, 7 with Hispanic majorities, and 3 with white-Anglo (European American) majorities.

Not surprisingly, the first commission elected from these new districts was much more diverse than previous commissions. One of its first official acts was to repeal an ordinance (passed by prior commissioners) that had required all county government documents and reports to be prepared exclusively in English. The ordinance was both insulting to and inconvenient for the county's substantial Hispanic population. ◆

Erratum

Our apologies go to the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) for leaving the "AID" out of its name in the fall edition.

Teaching Strategy

Affirmative Action Employment Programs

Dr. Mary Gelfand

Objectives

1. Students will become familiar with major concepts behind affirmative action programs.
2. Students will apply a specific strategy to a politico-legal problem that faced a typical American community.

Target Group: Secondary students
Time Needed: 3–5 class periods
Materials Needed: For each student, a photocopy of "Minority Inclusion Programs" (pp. 25–27 in this journal), the Student Handout on page 29, and the supplemental data below

Procedures

1. Introduce this topic by asking students to share with the class what they already know about minority inclusion and affirmative action programs, especially in the areas of voting and employment. List this information on the chalkboard or on chart paper. Create, and record in the same manner, a list of additional information students want to know about the topic, or questions generated by this initial discussion.
2. Ask students to read "Minority Inclusion Programs." Discuss the article, focusing on how it relates to their list of material already known. Is some of their information incorrect? Are the things they want to know addressed in, or are their questions answered by, this article? How can they resolve any unanswered questions? (These questions and their preliminary answers can form the basis for further research by individual class members, if desired.)
3. Divide the class into groups of four students. Explain that each student will take a specific role in an upcoming simulation. Explain the simulation to the class: each group will come up with an affirmative action program that they will later share with the class.
4. Distribute the simulation to group members. Allow students 1–2 class sessions to develop their program. If groups are unable to do so, direct them once again to the article "Minority Inclusion Programs," telling them to concentrate on the section "Government Employment and Contracting."
5. Have each group present its program. Discuss the simulation experience with the class, looking for similarities and differences in the programs. If time allows, and interest is high, the class might create a composite program.
6. When groups reach the point in their discussions where they realize that the city of Tunis must conduct a disparity study in order to show evidence of prior discrimination, provide them with the supplemental data.

Supplemental Data

The city of Tunis hired American Researchers Inc. (ARI) to conduct their disparity study. ARI has concluded that, in the City of Tunis, there is substantial evidence of discrimination against minority-owned businesses in the fields of construction and supply. There is also evidence of discrimination against individual employees who are members of minority groups. In its report, ARI provides these figures as contracting and employment goals.

Type of Work	African Americans (%)	Hispanic Americans (%)
Contracting		
Construction	15	8
Supply	20	10
Employment		
Professional staff	10	5
Other staff	35	25

Dr. Mary Gelfand is the head of Stepping Stone Educational Consultants, providing professional services to school districts and educational publishers, among others. She is an adjunct assistant professor of education at Loyola University in New Orleans, Louisiana.

Student Handout

Directions: Read this simulation and formulate a solution to the problem described in the last paragraph. Each group member will take the role and represent the viewpoint of one of the following people during your deliberations: mayor, city council representative, building contractors association representative, trade union representative.

City of Tunis Simulation

The city of Tunis, population 800,000, is a racially integrated city, with 50% of the population African American, 10% Hispanic American, 5% Asian American, and 35% European American. Tunis suffers from the same problems as most urban areas in the United States. Unemployment and crime are high, particularly among African and Hispanic Americans. In recent elections, a young, energetic African American was elected mayor of Tunis. Mayor Moshe and the newly elected city council (made up of 5 African Americans, 3 European Americans, and 1 Hispanic American) are determined to tackle the unemployment and crime problems. Increased employment opportunities for Tunis's minority populations are to be a key element in their program.

The mayor and city council have decided to increase their community's economic opportunities by building a multimillion-dollar sports and entertainment complex, the Tunis River Arena. The new arena will allow the city to host major sports and entertainment events and to bid on various professional sports teams. Preliminary estimates indicate that the Tunis River Arena complex can develop well over a million dollars in tax revenue for the city. In addition, 5,000 new jobs will be created during the construction, and 1,000 during the subsequent operation of the facility. Everyone is excited about this new employment opportunity.

Mayor Moshe and the city council want to develop an affirmative action program that ensures that a large percentage of the new jobs goes to the people who most need them—African and Hispanic Americans. The building contractors association and the local trade union leaders are violently opposed to this idea, arguing that the city has no right to tell them whom they may hire or refer for employment. Both groups threaten to sue the city in federal court if such a program is instituted.

What steps will the city of Tunis need to take in order to develop a constitutionally defensible affirmative action program? Are there any other actions the city can take to encourage minority participation in the arena project? How will you enforce your program?

Who's on First?

Multiculturalism and Free Speech

Perspectives on a recent hate speech case and its legal implications

Nat Hentoff

On June 22, five members of the U.S. Supreme Court came down with a decision that strengthened the First Amendment in ways few had expected from the Rehnquist Court. Indeed, Chief Justice Rehnquist was one of the five, and the decision was written by Antonin Scalia, who usually has a very crabbed view of the Bill of Rights. (Although, unlike Rehnquist, Scalia has twice joined William Brennan in affirming the First Amendment right to burn the American flag.)

The case, *R.A.V. v. St. Paul,* split the Left from the very beginning. It started with some skinheads burning a cross, late at night, in the front yard of the only black family in a working-class neighborhood of St. Paul.

R.A.V. is Raymond A. Viktora, who was arrested for burning the cross. His court-appointed lawyer, Ed Cleary—who has defended some very unpopular clients, black and white—said from the start that his client should be punished if he was indeed responsible for the cross-burning. He should be charged with trespass, arson, or for violating a Minnesota "terroristic-threat" statute that could have sent Viktora away for up to five years.

But Cleary objected strenuously to the municipal ordinance under which Viktora was actually charged:

"Whoever places on public or private property a symbol object appellation, characterization, or graffiti, including, but not limited to a burning cross or Nazi swastika which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender, commits disorderly conduct and shall be guilty of a misdemeanor."

This statute was looked on admiringly by many enemies of bigotry in other states and cities, and had it withstood Cleary's constitutional challenge, similar laws would have been adopted elsewhere. But William Kunstler, whom no one can accurately accuse of being insensitive to bigotry, considered it an extremely dangerous ordinance. "If it holds up," he told me, "the First Amendment will be in shambles."

As Bruce Ennis—who filed a brief for the Freedom to Read Foundation—emphasized: "Although in this case the ordinance is being applied to a 'message of racial supremacy' that was . . . directed to a minority group, the ordinance covers far more than hate speech directed at minority groups. *There is no limitation on the subject of the speech so long as it arouses anger alarm or resentment in others* based on race, color, creed, religion, or gender.

"If the St. Paul ordinance had been in effect in the South during the 1950s, it could have been used to prosecute a black family for putting a sign on their front lawn demanding: 'Integrate all-white schools now!' That speech would certainly have 'aroused anger, alarm, or resentment in others on the basis of race.' "

Yet only a few groups (including the American Civil Liberties Union and the American Jewish Congress) asked the Supreme Court to strike down this mother of all overbroad laws punishing speech.

Supporting the prosecutor was a multicultural mosaic of organizations for whom free speech is the life force of their organizing and advocacy work. But here they were telling the Supreme Court to put a gag not only on Raymond Viktora but eventually on themselves:

The Asian-American Legal Defense Fund; the NAACP (the NAACP Legal Defense Fund would have been on the list but didn't have time to file a brief); the Anti-Defamation League of B'nai B'rith (two of whose lawyers helped the prosecutor prepare for the Supreme Court); People for the American Way; the Center for Constitutional Rights (with which Kunstler is affiliated); the Center for Democratic Renewal; and the National Council of Black Lawyers.

Also the National Council of La Raza; the International Union of Automobile, Aerospace, and Agricultural Implement Workers of America (UAW); the National Organization of Black Law Enforcement Executives; the National Lawyers Guild; the United Church of Christ Commission for Racial Justice; the National Institute Against Prejudice and Violence; the National Coalition of Black Lesbians and Gays; and the National Black Women's Health Network. (That last brief was written in part by Catharine MacKinnon.)

I asked William Kunstler why all these progressive groups had come out for such a startlingly repressive anti-free-speech statute.

Nat Hentoff is a columnist for *The Washington Post* and *The Village Voice,* and author most recently of a book called *Free Speech for Me, But Not for Thee.*

"Who's on First? Multiculturalism and Free Speech" is reprinted from *The Progressive,* November 1992, 15–17, by permission of the author.

"They couldn't see beyond the burning cross," he said.

I think there's another explanation. I know the lawyers and some of the leaders of those groups, and several did see the dangers to the First Amendment in the ordinance. But supporters of the ordinance are so convinced of the crucial need to punish hate speech that they were afraid the Supreme Court might come down with a decision in this case that would make it very difficult to sustain speech codes in colleges. And they wanted to protect state laws that allow longer sentences for crimes motivated, at least in part, by bigotry.

Rather than see the First Amendment taken "too far," these civil-rights and multicultural organizations preferred to keep the St. Paul statute alive, and thereby protect college codes and hate-crime laws. Even the American Civil Liberties Union was partly influenced by this priority. Its initial brief to the Supreme Court in the *R.A.V.* case was a strong, clear defense of free speech. But that got watered down because the ACLU's legal director, John Pail, believes that when it comes to hate speech, the First Amendment must be "balanced" against the Fourteenth Amendment (equal protection under the laws). The ACLU national board, moreover, had been looking favorably at adopting a policy supporting state laws that add to your sentence if you have committed a crime during which you say something bigoted.

So, when Ed Cleary came to the Supreme Court, he was greatly outnumbered. But he and the First Amendment won. To begin, all nine members of the Court agreed that the St. Paul ordinance was so obviously overbroad—catching all kinds of constitutionally protected speech in its net—that it violated the First Amendment.

But then something happened that none of the lawyers on either side had anticipated. Scalia, Rehnquist, Anthony Kennedy, David Souter, and even Clarence Thomas decided—in Scalia's words—that no "categories of speech [are] entirely invisible to the Constitution."

The Court, for decades, has said there are categories of unprotected speech—obscenity, defamation, and "fighting words." The last category comes from the 1942 *Chaplinsky* case in which the Court ruled that the First Amendment does not protect words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." (Nobody has won a case in the Supreme Court under that rule since 1942.)

The "fighting-words" doctrine came into the *R.A.V.* case because the Minnesota Supreme Court decided, by fiat, to interpret the St. Paul ordinance as being based on the "fighting-words" exception to the First Amendment. The ordinance doesn't read that way, but the Minnesota Supreme Court didn't want the highest court in the land to overthrow the ordinance. So, in effect, it pretended it was "narrowing" the statute to include only unprotected "fighting words."

Also important to note is that most college speech codes are now rooted in the "fighting-words" exception. After the University of Michigan and the University of Wisconsin saw their codes shredded in Federal district courts, their lawyers thought they could redraft the codes, basing them on "fighting words." The *R.A.V.* decision, however, makes all of these college codes unconstitutional, as well as any other laws based on selective "fighting words."

Here is how the Scalia-led majority of the Court extended and deepened the scope of the First Amendment. St. Paul claimed that since "fighting words" are not protected by the First Amendment, the city could punish people who use particular "fighting words" that it considered especially harmful to certain groups.

Not included in the ordinance, however, were other "fighting words"—homophobic denunciations, slurs causing anger on the basis of political affiliation, or insults directed at the disabled. Well now, said Scalia, "Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas."

He had already pointed out that "the point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." Therefore, even though "fighting words" can be regulated by the Government, it cannot punish *only* those "fighting words" that it considers demeaning to *particular* groups.

Rod Smolla, a First Amendment scholar at William and Mary law school, believes that this majority decision "will prove to be a long-term enhancement of free speech in America. The Court makes clear that the

Government has to be neutral when it regulates speech. It cannot discriminate based on the viewpoint of the speaker."

Floyd Abrams, who has successfully argued more free speech cases before the Supreme Court than any other advocate, noted:

"It is understandable that this decision should be controversial. The expression it protects . . . is so vile, so brutal in the message it offers that only the most secure and First Amendment-protected society would think of protecting it. Indeed, we are alone in the world in affording such protection."

That analysis is rather romantic, however. If a national plebiscite were taken on whether such expression should have been protected by the Supreme Court, I expect that a huge majority of the populace would form an unprecedentedly inclusive coalition against the decision: the Right, the Left, Democrats, Republicans, feminists, Pat Buchanan, Bill Clinton, George Bush, gays and lesbians, skinheads.

We Americans are alone in the world not in our devotion to untrammeled freedom of expression but in having a Supreme Court that sometimes, only sometimes, protects individuals against majority condemnation of freedom of expression.

Meanwhile, the future of hate-crime laws is now in doubt. On June 23—the very day after the High Court ruled on *R.A.V.*—the Wisconsin Supreme Court decided, 5-to-2, that the state's hate-crime statute (adding to prison terms for crimes committed because of "bias") is unconstitutional.

Said Chief Justice Nathan Heffernan: "A statute specifically designed to punish personal prejudice impermissibly infringes upon an individual's First Amendment rights. . . . The legislature may not subvert a constitutional freedom—even one as opprobrious as the right to be a bigot."

Punish the crime that was committed—assault for instance—but not the bigoted thoughts of the person who committed the crime. Heffernan quoted from the most comprehensive article so far on "hate crimes," Ohio public defender Susan Gellman's "Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws," published in the *UCLA Law Review* last year.

Gellman reminds us that a person accused of having committed a crime with bigoted hate in mind is subject to being investigated to find out if there was any bias in his or her "remarks on earlier occasions. Any books ever read, speakers ever listened to, or associations ever held." Anything ferreted out of the accused's past can "be introduced as evidence that he or she held racist views and was acting upon them at the time of the offense." This is McCarthyism as a weapon against bigotry.

Multiculturalism itself is endangered by laws that create "thought crimes." Speech that arouses anger or resentment is part of the core history of every one of the groups that supported the St. Paul ordinance. The foundation of our national identity is a shared Bill of Rights. And the First Amendment, as retired Justice William Brennan has emphasized, brings force to all the others. But most of us, including many multiculturalists, want to protect ourselves from the First Amendment. And that is the way to eventually destroy the essential liberty that gives breathing room to everyone. ◆

Divided We Stand? *continued from page 4*

6. Discuss possible implications of the rankings. General questions might include the following: How do you define the issues and principles that top the list? Why have you so ranked them? What are some applications for each? Why have you ranked the other items in middle or low positions? What might be the consequences of emphasizing the top ones over the bottom ones?
7. Pass out Student Handout 2, "How Strongly Do You Believe This?" Discuss each hypothetical situation and identify the legal issues and principles involved. Ask students to decide how they would respond to each situation and to offer reasons for their decisions, tied to the list they have made.
8. After discussing the hypotheticals, ask students to work in groups to rerank their list. A representative from each group will explain the new rankings.

Evaluation

Design several new hypothetical situations, or draw from actual court decisions. Ask students to apply their new rank order. Also, ask them to define *diversity* and determine whether each hypothetical situation fits with their definition. Assess their work based on the reasonableness, clarity, and accuracy of the responses, as well as consistency with their legal issues and principles.

Teaching Strategy

The Struggle with Hate Speech

Jennifer Bloom

It is important to often repeat that the freedoms ...guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.

—*Judge Douglas, concurring in* Local Lodge 1297 v. Allen, *490 NE2d 865 (1986)*

Background

Just as American history is full of stories about the lives and accomplishments of Native Americans, Europeans, Africans, Asians, Muslims, Jews, Protestants, Catholics, atheists, men and women, heterosexuals and homosexuals, and others, it is also full of stories of hatred and violence among these groups. As our traditionally rich and diverse society becomes even more so, will we view our diversity as a source of strength or of division and intolerance? How far should our government go in forcing us to be "nice"?

This tradition of hate-motivated violence, which has been passed from generation to generation, has resulted in many states treating it as a special social problem that requires special laws aimed at deterrence. Because hate-motivated behavior is often seen by the perpetrator as serving a higher social good by ridding society of "bad people," and, in fact, is often not perceived as wrong at all, states are seeking alternative ways to end the victimization of the "bad."

Two examples of state responses to the increase in violent attacks against minority group members are a St. Paul, Minnesota, city ordinance aimed at behavior such as cross burning, and a Wisconsin law that increases a sentence if the defendant selects a victim because of bigoted beliefs. (Such laws are known as enhancement laws.)

These and other laws have resulted in a somewhat confusing area of law that attempts to distinguish between speech and conduct. Laws in this area can be classified broadly as hate speech laws and hate crime laws. Hate speech laws are legal restrictions on what people may communicate to one another either in spoken words, in writing, or through expressive conduct. Hate crime laws are aimed at criminal conduct motivated by hatred. In order to be classified as a hate crime, a perpetrator's act must be a violent criminal act such as assault, battery, murder, or arson. Whether an act is expression, and therefore governed by hate speech laws, or conduct, governed by hate crime laws, can be confusing.

Objectives

As a result of this lesson, students will

- be able to define hate speech and describe how it differs from hate crime
- identify how the constitutional principles of equal protection and free speech conflict
- identify arguments supporting and opposing hate speech laws
- analyze arguments to determine which laws are more important in meeting society's needs
- apply Supreme Court decisions to proposed legislation
- describe procedures used in, and conduct, legislative hearings

Target Group: Grades 9–12
Time Needed: 4 days
Materials Needed: Student Handouts 1–3

Procedures

1. Explain to students that, for the next few days, they will be exploring hate speech. Ask them to brainstorm examples of hate speech. Next, ask them to brainstorm the damage it does.
2. Explore with students what, if anything, should be done about hate speech. What should government do? What should parents and communities do? What should friends do?
3. Have students read the two case studies on Student Handout 1. After discussing what happened in each, ask students to consider questions in the accompanying "Teacher's Discussion Guide" on page 34.
4. Discuss with students the roles that hate speech and hate crime laws can play in developing respect for diversity. Explain that many efforts have been made to limit the use of hate speech. The students are going

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Jennifer Bloom is the director of the Minnesota Center for Community Legal Education at Hamline University School of Law in St. Paul, Minnesota. Law students Melissa Eberhart and Rachelle Loewenson assisted her in preparing the mock legislative hearing strategy.

to consider one such effort in a mock legislative hearing.

5. Have students read "Baron's Hate Speech Bill" on Student Handout 2 and then prepare for their mock legislative hearing by familiarizing themselves with "Committee Hearing Procedures" on the same handout.
6. Pass out Student Handout 3, which includes the opinions of 10 experts (5 for and 5 against the proposed hate speech bill) who may testify before the legislative committee. Assign these roles to students, as well as those of committee chairperson and author of the bill. The committee chairperson will be responsible for implementing the hearing procedure as outlined on Handout 2. The author of the bill will briefly explain it at the beginning of the hearing.
7. Allow students time to become familiar with their roles. The experts should talk with one another to better understand their positions. They must be prepared to answer questions related to their positions and to provide answers consistent with them.
8. Assign students to the legislative committee (in most cases, this will be the remainder of the class). The committee should be thoroughly familiar with the committee procedure and the proposed bill on Student Handout 2. They may discuss the bill.
9. Have students conduct the legislative hearing.
10. Ask the class to evaluate the proposed/revised bill. Review the questions that were to be considered by the legislative committee. Ask for a hand vote indicating support for the bill. Have students anticipate what court challenges might result from the bill's passage and what the court rulings might be.

Teacher's Discussion Guide

a. Why should speech be protected?

Write the question on the chalkboard along with this quote: "The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." —*Cohen v. California*, 403 U.S. 15 (1971)

Make sure to bring out in the discussion the idea that speech is essential to debate and decision making in our democracy, where we foster a "free marketplace of ideas." Also, discuss how speech is fundamental to individual fulfillment and conscience.

b. What is the difference between symbolic speech (as in *R.A.V.*) and conduct (as in *Mitchell*)?

Write the question on the chalkboard along with the phrase "dragging a flag through the mud." Lead students to the understanding that, to determine whether conduct is symbolic speech, one must look to the intent to convey an idea. Explain that, in *Texas v. Johnson*, 491 U.S. 397 (1989), Justice Brennan distinguished dragging a flag through the mud with "no thought of expressing an idea" from doing so with such a motivation. He suggested that the former, is not expressive conduct protected by the First Amendment, while the latter is, even if it is not offensive to others.

c. How can one identify a hate speech law?

Write the question on the chalkboard along with: "Can this law be violated solely by engaging in speech or expressive conduct?" Explain to students that whenever the answer to the question is yes, the law is a hate speech law.

d. Are all laws regulating hate speech unconstitutional?

Write the question on the chalkboard along with the definition for *fighting words* (see Student Handout 1). Explain that the First Amendment protects the right to be a racist, to join racist organizations, and to express racist beliefs. However, the First Amendment does not protect the right to commit racist assaults or to use "fighting words."

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Student Handout 1

R.A.V. v. St. Paul, 112 S.Ct. 2538 (1992)

On June 12, 1990, five adults and R.A.V., a 17-year-old youth, were arrested for burning three crosses, one inside the fenced yard of an African-American family that lived across the street from the house where R.A.V. was staying. R.A.V. was charged with violating a St. Paul ordinance providing that "Whoever intentionally, or with reckless disregard of so doing, puts another in fear of immediate bodily harm or death by placing on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to a burning cross or Nazi swastika, which is reasonably understood as communicating threats of harm, violence, contempt, or hatred on the basis of race, color, creed, religion or gender, commits an assault and shall be guilty of a misdemeanor."

On July 17, 1990, the trial court dismissed the charge of violating the St. Paul ordinance, ruling that the ordinance was too broad and that it violated the First Amendment's guarantee of free speech.

The city of St. Paul appealed to the Minnesota Supreme Court, which concluded that the ordinance, if narrowly construed to reach only unprotected conduct (fighting words), was constitutional.

R.A.V. appealed to the U.S. Supreme Court, which overruled the Minnesota Supreme Court, ruling that "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." The Court held the ordinance content discriminatory because it applies only to fighting words that insult, or provoke violence, on the basis of race, color, creed, or religion but not when applied to political affiliation, union membership, or homosexuality. Justice Scalia pointed out that, while fighting words are an exception to First Amendment protection, a state may not pick and choose which fighting words are the ones to be punished.

The Court also held that the ordinance was not necessary to achieve the city's interest in protecting groups historically subject to discrimination. Justice Scalia wrote, "We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not." The Court found that, although "Burning a cross in someone's front yard is reprehensible, . . . St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire."

Wisconsin v. Mitchell, 113 S.Ct. 2194 (1993)

A group of young blacks in Kenosha, Wisconsin, had been discussing a scene in *Mississippi Burning*, a movie about the Ku Klux Klan during the 1960s, in which a white beat a young black. Todd Mitchell, the 19-year-old defendant, asked the group, "Do you all feel hyped up to move on some white people?" When 14-year-old Gregory Reddick, a white, walked by a short time later on the other side of the street, Mitchell said: "There goes a white boy; go get him." Mitchell then urged the group to surround the victim.

The group ran toward Reddick, surrounded him, and repeatedly kicked and beat him until he was unconscious, resulting in permanent brain damage. They then stole his tennis shoes. Mitchell was convicted of aggravated battery. The jury also found that he intentionally selected Reddick as the victim because of his race. Under Wisconsin law, one who "intentionally selects" a felony victim "because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person" is subject to an increased penalty of up to five years. Mitchell's sentence for aggravated battery was increased by two years. He appealed to the Wisconsin Supreme Court.

Relying on the U.S. Supreme Court's decision in *R.A.V. v. St. Paul*, the Wisconsin Supreme Court ruled the law unconstitutional because racist thought (motive behind the selection of a victim) is protected by the First Amendment. Wisconsin appealed to the U.S. Supreme Court, which overruled the Wisconsin court, finding that the Wisconsin law not in violation of the First Amendment because it was directed at conduct (the "selection" of a victim) rather than speech (including beliefs and thoughts). It distinguished *R.A.V. v. St. Paul* because the law in that case was explicitly directed at speech (symbolic speech as expressed in burning a cross).

Vocabulary

Fighting words are words that are likely to provoke immediate violence. If a law is aimed only at fighting words, it might be held constitutional.

Symbolic speech, such as cross burning or dragging the American flag through the mud, expresses an idea without spoken words.

Student Handout 2

Mock Legislative Hearing

Baron's Hate Speech Bill

The state of Baron is considering the enactment of anti-hate speech legislation. This bill has been drafted and is being debated by a legislative committee.

> **It shall be a petty misdemeanor to express racist or discriminatory comments, epithets, or other expressive behavior (including symbolic speech) directed at an individual or, on separate occasions, at different individuals if such comments, epithets, or other expressive behavior**
>
> **a. demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry, or age of the individual or individuals, and**
>
> **b. create an intimidating, hostile, or demeaning environment.**
>
> **Although such speech or expressive conduct may often be accompanied by violent behavior, violent behavior is not required for a violation of the law to occur.**

Because of the Supreme Court's decisions in related cases, the Baron legislature has decided to seek advice from experts representing many of the groups interested in the bill. Questions that the legislative committee should consider include

1. Should government be involved in this? Why or why not?
2. Is the proposed law constitutional?
3. If not, can it be changed so that it is constitutional?

What Is a Legislative Hearing?

After a bill is introduced in Congress, it goes to a committee for consideration. If committee members decide to proceed with the bill, they usually hold public hearings, where testimony is given for and against it. Cabinet members, scholars and various experts, members of Congress, and others may be asked to testify.

Committee Hearing Procedures

1. Committee chairperson calls the meeting to order.
2. Chairperson announces that there is one item on the day's agenda: the proposed bill regarding hate speech.
3. Chairperson calls on the bill's author to explain the bill.
4. Author briefly explains the bill, states that there are witnesses who want to testify in favor of it.
5. Chairperson calls on those in favor of the bill to testify. These experts stand before the committee, and each begins with "Mr./Madam Chair, members of the committee—" One by one, they explain their positions.
6. Chairperson asks for questions from the committee members. Anytime committee members wish to speak, they say "Mr./Madam Chair" and wait to be called upon.
7. Chairperson asks if others want to testify. Experts opposing the bill stand before the committee and, following the same protocol, explain their opposition one by one.
8. Chairperson asks for questions from the legislative committee members.
9. Committee discusses the bill. They may change the language of the bill by adding or deleting words. "I move to amend the bill by—" The amendment is then voted on separately. If it passes, it is incorporated into the bill.
10. Committee member moves for the bill to pass.
11. Chairperson asks for those in favor of the motion to say aye and for those opposed to say nay. The chairperson estimates the vote on each side and announces "The motion prevails (or fails)." Any member may ask for a roll-call vote, in which the chairperson asks each member to register a vote on paper or by voice. The chairperson announces the vote.
12. Chairperson says "Having no other items on the agenda, the meeting is adjourned."

Student Handout 3

Hate Speech Bill Proponents and Opponents

Note: These arguments have been taken from actual Supreme Court arguments, court opinions, advocacy pieces, and news reports.

PROPONENTS

1. School Superintendent: "We must look at this situation with the balancing notion that speech must sometimes be suppressed for the common good. If someone feels personally offended by something someone says, that's grounds for a case of harassment, in which case the student should be suspended. We must take a stand against this racism-promoting climate."
2. College President: "The college's most important challenge is to achieve a fruitful balance between respecting the right of its individual members to operate and speak freely in pursuit of the truth, and fostering a climate of mutual respect and adherence to accepted community values. Speech codes put people on notice that certain speech is frowned upon. It's all part of learning to live in a diverse world. Students must learn to discuss and argue on the basis of reason, without attacking people."
3. Director, Association to End Racial Violence: "Bias crimes are on the increase. These shocking stories recently made headlines. In a Washington, D.C., suburb, two youths wanted revenge for being called 'honkies.' They assaulted two blacks. One of the blacks escaped, but the other was attacked and called names, and the attackers threatened to set her on fire. In Kentucky, assailants beat a young gay male with a tire iron. He now has severe brain damage. In California, a 15-year-old high school cheerleader was badly beaten because she has one white and one black parent."
4. Special Assistant Secretary, Department of Education Office of Civil Rights: "The Department of Education Office of Civil Rights (OCR) recently issued 'Guidance for Racial Incidents and Harassment,' which, although lacking the force of law, does state enforcement policies under Title VI of the Civil Rights Act of 1964. The document sets forth the liability of public school officials for racist activity by students and employees.

   "OCR investigates complaints of racial harassment and racial incidents at federally funded educational institutions, including public elementary and secondary schools. OCR's involvement may result in a charge of 'hostile environment' at any school that allows students or employees to create an environment that interferes with a student's ability to participate in, or benefit from, services, activities, or privileges the school provides. OCR advises that, in developing and implementing policies to assure that a hostile environment is not created, schools must not forget First Amendment free speech principles, which must be reconciled with the harassment guidelines."
5. Lawyer, State School Boards Association: "Governmental officials, which include school employees, are responsible for any conduct that violates a clearly established constitutional right. The U.S. Supreme Court has determined that, although children retain their constitutional rights, including freedom of expression, when they attend school, these rights must be balanced against the need for school officials to maintain order in the schools.

   "Constitutionally protected speech may be limited if a school official determines that the expression will cause disruption or interfere with school discipline. In making this determination, the school official may consider the age of the children involved."

OPPONENTS

1. Civil Liberties Union Representative: "Expression of ideas is the most absolute of the values protected by the U.S. Constitution. An infringement upon expression may not be permitted unless the expression is directed to inciting or producing imminent lawless action. Questions to ask include, Did racial violence follow the expression of ideas? and Did the person expressing the ideas threaten someone? We make no attempt to condone racist testimony. In fact, we find these statements very offensive. However, we stand firmly in arguing that there is a constitutional right to express the ideas, regardless of their offensive message."
2. Constitutional Lawyer: "Hate speech laws create a mine field. It is very hard to define what constitutes hate speech. Are there certain words that are by their very nature so offensive that their utterance should be punishable? What would they be? Should the hate speech law list these words? Would a list trigger charges of content discrimination if it failed to include every possible offensive word? Does it matter who says them? For example, does it matter whether the person yelling 'nigger' is white or black?

   "These kinds of laws are vague standards that give authorities the power to label speech as something else, punishing it because it has crossed an undefined line of propriety, turning into behavior that flagrantly disregards the well-being of others or subjects others to demeaning actions."
3. President, Center for School Change: "Schools should provide the campus conditions under which racist, sexist, and homophobic ideas can be effectively countered with the weight of other humane, respectful, and constructive ideas. Instead of punishing speech, there should be race relations counseling programs, required courses on the historical roots of discrimination, recruitment of minority students and teachers, and curriculum changes that bring all cultures into the mainstream of study."
4. Political Science Professor, President of Academic Freedom Coalition: "Many words are terribly hurtful, and some evoke the worst aspects of our national history. But banning hateful comments only chills campus discussion and debate by making students and teachers afraid to speak out. It interferes with the search for truth. In fact, allowing racist speech may enable society to deal with causes of racism, while suppressing the speech merely hides the problem. Let's talk about it. Let's learn from it."
5. Chairperson, Free Speech Committee, Center for Individual Rights: "Laws similar to the St. Paul ordinance in *R.A.V.* face possibly insurmountable constitutional problems. For example, a St. Paul resident who erected a billboard on his own property expressing his view that women belong at home rather than at work can easily be subject to prosecution under the proposed law. Or the victims in the cross-burning case would face prosecution if they responded to the cross burning by placing a sign on their front lawns condemning white racism."

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Cumulative Voting: Is It Wrong?

Perspectives on a voting change that could ensure a stronger minority voice at the polls

Daniel R. Ortiz

Many corporations choose their boards of directors in an interesting way called *cumulative voting*. Shareholders get 1 vote for each share of stock they own and may distribute their votes any way they wish to candidates. For example, in an election to pick 8 directors, a shareholder holding 10 shares of stock could cast all 10 of her votes for 1 favorite candidate, or she could cast 5 votes for her favorite candidate and only 1 vote for each of 5 other candidates. Once everyone had voted, the 8 candidates receiving the most votes overall would each win a seat.

Several people have suggested that we should use cumulative voting in political elections, as well. For example, cumulative voting could be used in elections in which multiple candidates are running to fill multiple seats on a municipal board, commission, or council. Since everyone is entitled to the same voting power in political elections, each voter would have the same number of votes—say 10. Each voter would then give each of his favorite candidates as many of the 10 votes as he wishes. For example, a voter could give his 5 favorite candidates 2 votes apiece, or he could give 6 votes to his favorite candidate and 1 vote apiece to each of the next 4 candidates he likes. The only restriction is that the total votes he casts may be no more than 10.

Such a system may seem strange, and it would take a little getting used to, but it might have several advantages over the present system. First, enabling individual voters to cumulate their votes any way they wish permits them to say not only which candidates they prefer, but also what the intensity of their preference is for different candidates. In an ordinary election, where voters have only 1 vote, all they can express is that they prefer one candidate over another. The fact that they may have greatly preferred one candidate over another is lost.

Second, taking intensity of preference into account changes the kind of candidates elected. No longer can candidates rely solely on the breadth of their support. If everyone mildly likes a particular candidate, that candidate may not win. Instead, victory could go to someone fewer people like, but like intensely. Say each of 10 voters has 10 votes, and a candidate liked by all voters receives 1 vote from each. That candidate will have 10 votes, but she will be defeated by a candidate whom only 5 voters liked, but liked so well that they gave her 5 votes each, for a total of 25 votes. In this way, cumulative voting makes *how much* people like a candidate as important as *how many* people like a candidate.

Third, this change in voting rules will often allow people who are otherwise not numerous enough to elect a representative to achieve some representation. If people in a group feel intensely about a certain candidate, they may be able to elect him even if they don't comprise a majority of the voting population. A racial or religious minority group, for example, that would usually be outvoted by the majority might be able to win a seat if they focus their votes on a few favorite candidates.

Assume that a city has two groups of people living in it, the As and the Bs. The As make up 60 percent of the population, and the Bs the remaining 40 percent. Under ordinary voting rules, if the As and Bs vote in solid blocks against each other, the candidates that the As support will all win. Even though the Bs make up nearly half the voting population, they will elect none of the candidates they favor. By contrast, under cumulative voting, the Bs could get some degree of representation, depending upon how well they focus their voting. If they vote in a solid block for the same candidate, that candidate will be elected. If they all vote carefully, in fact, they might elect around 40 percent of the representatives.

This fact bothers some people. Shouldn't majorities win? they argue. That's surely correct. The only question is whether majorities should win all the seats or only some majority of them. By allowing voters to express the intensity of their preferences, cumulative voting would occasionally allow the defeat of a numerical majority that doesn't feel strongly about some of its candidates. ◆

Daniel R. Ortiz is Professor of Law and Harrison Foundation Research Professor at the University of Virginia and Visiting Professor of Law at the University of Southern California in Los Angeles.

Teaching Strategy

Cumulative Voting: A Controversy

Gayle Mertz

Objectives

At the completion of this lesson, students will

- Recognize the inherently controversial nature of legal issues related to cultural diversity and voting rights
- Identify the historical foundations of controversies related to extending full citizenship rights to diverse peoples
- Compare, contrast, and analyze varied responses to similar questions
- Identify one position on an issue and the reasoning behind it

Target Group: Secondary students
Time Needed: 7–8 days
Materials Needed: Photocopies of Gelfand's article on pages 25–27 for half the class; Ortiz's article on page 38 for the other half; the Student Handout on page 40 for the entire class.

Procedures

1. Prior to the first class period devoted to this activity, ask half the class to read Gelfand's article, and the other half to read Ortiz's article. If possible, ask students to research and read supplementary material about voter rights. Devise a system that will insure that different students read about voter rights in different eras of U.S. history.
2. Ask students to work together in groups of four or six, with each group consisting of equal numbers of students who have read the two articles. Ask students to work together to complete the Student Handout.
3. As a class, discuss each group's answers to the handout questions. Compare and contrast their answers. Ask students if their group's answers differed greatly from the answers they would have given as individuals. How much did they learn from one another, and how much were they influenced by one another? Did the cultural background of students (or students' families, friends, or ancestors) influence how students felt about the questions?
4. Ask students what laws have contributed to extending voting rights to all U.S. citizens. (Examples: Emancipation Proclamation, Fifteenth Amendment, Nineteenth Amendment, 1964 Voting Rights Act, Twenty-sixth Amendment). Ask students to work in pairs or small groups to research how different perspectives encouraged or delayed the passage of each of these (or other) measures. Ask students why, if this nation was founded on the principle of equality, has there been so much controversy regarding extending the right to vote to all citizens.
5. Explain that controversies about voting rights and voting equity exist today, and that different people who support voting rights may respond very differently to a standard set of questions about the topic.
6. Ask students to distribute the handout to people with culturally diverse backgrounds in their school, families, or community. Allow one week for students to return the completed worksheets to class. It is unnecessary for respondents to identify themselves. (Students will probably need to explain cumulative voting to the individuals being surveyed; an alternative is to furnish respondents with a copy of Ortiz's article).
7. As a class, review and analyze the responses.

Teacher's Note

This exercise can be used with any of the topics discussed in this journal or elsewhere. Devise a new set of questions about your topic, and repeat the procedure. Use these guidelines for formulating your questions: Question 1—Set your first question in a historical context; Question 2—Highlight one solution that has been used, and ask students about its effectiveness; Question 3—Ask students to consider a new, unconventional approach to solving a problem, and ask their opinions; Question 4—Ask students to offer innovative solutions for the future.

Gayle Mertz is a free-lance writer and the director of the Safeguard Law-Related Education Program in Boulder, Colorado.

Student Handout

Voters Rights Survey

Directions: Work together as a group to answer the following questions. Share the material you have read for this activity and any other information or opinion you may have about voting rights. Use your combined knowledge to write the best possible answers to these questions.

1. Americans generally agree that many of our citizens have been denied an equal opportunity to participate in the voting process throughout the nation's history. Do you believe that, once registered voters have voted, each vote has carried equal weight and equal opportunity to influence our political process? Why or why not?

2. Does equal access to the polls ensure equal participation in the voting process? Why or why not?

3. What does cumulative voting mean to you? Is cumulative voting a reasonable and effective remedy for past inequities?

4. Many individuals and groups worked hard to enhance the rights of all voters. Yet many people believe that inequities still exist. What would you do to better equalize the rights of all voters?

Conflict, Violence, and Cultural Diversity

A look at culturally based school conflicts and a "relationship-building" approach to solving them

Thomas A. Regulus & Kimberley Leonaitis

Conflict and violence among students, and between students and educators, are problems in many schools across the nation, with high rates of crime involving students and teachers being the most frequently reported problem. One study of Illinois high schools reports that 22.6% of students and 28.5% of teachers were victims of theft, and 24.7% of students and 18.9% of teachers were victims of attempted or actual physical attacks in or around their schools, in the 1989–90 school year (Knox, Laske & Tromanhauser 27).

The increasing cultural diversity of students and school staffs is generally a major source of conflict and violence. Without open recognition of the problem and the introduction of specific strategies to address it, progress in building nonconflictual, culturally diverse schools will be slow. This situation is complicated by the fact that increases in school crime have seen a decrease in reliance on informal relationships among students, school staffs, and parent groups to regulate these problems. Schools have become more dependent on formal school codes of conduct and discipline, as well as on state and local laws meant to regulate student behavior. These, however, will not be productive in reducing culturally based conflict.

This article will describe how the increasing cultural diversity at school can create conflict and violence, and how a return to the greater use of informal means of social control through "relationship-building" intervention can help reduce them.

Conflict and Culture

Conflict is a circumstance in which the interests of two or more persons are at odds, followed by a social, verbal, and sometimes physical struggle over the issues of difference between the parties. As schools have become more racially, ethnically, and socially diverse, conflicts involving cultural differences have also increased.

But what is *culture?* Culture is a set of values, beliefs, and expected behaviors that guides the lives of a group's members. It provides meaning and purpose, and organizes lives and experiences. Cultures develop as a means of solving problems that groups experience over time, and cultures are different because their problems and experiences have been different.

Cultural Differences Hypothesis

The cultural differences hypothesis states that, "any subculture operating according to principles not equally operative in the major culture will be assumed to be attending to, processing, storing, retrieving, and/or practicing functional information not exactly [as] the major culture" (Grubb & Dozier 23–45). According to M. W. Matlin's findings in *Cognition*, since people reconstruct information consistently with their preexisting cultural beliefs, focusing on their own beliefs and values, they are often unaware or ignorant of the significance of other cultures' ideas and beliefs. In addition, since culture shapes our understanding of events, words, and behavior (Harris, Lee, Hensley, & Schoen 413–31), different cultures may interpret identical events or behaviors in different ways. Misunderstandings about the different communication and interaction styles as well as value and beliefs systems among racial, ethnic, and social groups can cause conflict that escalates into violence.

Examples of differing cultural values, communication styles, word usage, and body language illustrate problems inherent in any culturally diverse environment, including that of schools.

Manhood and Homosexuality

Among some racial and ethnic groups, beliefs about manhood are particularly strong and might be expressed with highly ritualized behavior. Most of us know that a white person's referring to an African-American youth as a "boy" is frequently perceived as insulting and belittling. A verbal or physically aggressive response is a cultural reaction to the subordination of African Americans during slavery and the Jim Crow era in U.S. history. For Mexican-American youth, manhood is highly personal and private. A stranger's staring at these youth can be perceived as an invasion of privacy.

A strong example of the power of beliefs about manhood is some cultures' uneasiness about, and even

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Thomas A. Regulus is an associate professor in the Department of Criminal Justice at Loyola University of Chicago. Kimberley Leonaitis is a student and research assistant in Loyola's criminal justice program.

abhorrence of, homosexuality, which threatens their image of manhood. In these groups, intimate touching and verbal communication between males are avoided. This is not so in the French culture, however, where values involving manhood and intimate expressiveness do not discourage the combination of the two, so that there is tolerance and even encouragement of expressive touching, such as embracing and kissing, among heterosexual males. Obviously, encounters among cultures with opposing values about masculinity, intimate expressiveness, and homosexuality have the potential for conflict.

Womanhood and Courtship

Gender-specific differences in subtle and overt behavior having intended and unintended sexual references are another area in which cultural differences can be sources of conflict. Women raised in traditional Arabic, Greek, and East Indian cultures, which emphasize conservative public exhibition of, and respect for, female sexuality, consistently find any sexual overtures from males embarrassing, belittling, and intimidating. Interethnic and interracial romance is another potential source of conflict, as cultural observers find these relationships threatening to the racial and ethnic solidarity of their group. Kochman (77–88) documents African-American and white differences in male and female responses and feelings to sexually explicit courting conversations in the United States.

Self-presentation and Interaction

Some cultures, such as those of Asia and Southeast Asia, have an inner-directedness that is a source of personal strength and control. Group members focus much of their conscious thought and behavior on their personal states of being, and their undemonstrative style might be interpreted as aloofness, shyness, subordination, or timidity by members of some other cultures. African-American and Hispanic youth, in contrast, are more demonstrative and communicative about themselves and more intrusive on others' thoughts. These youths may anger or intimidate members of introspective groups. In a related example, African Americans have an expressive and intense manner of debate and discussion that may appear hostile and conflictual to white Americans, whose style is more dispassionate and objective (Kochman 106–29). There is thus an inherent potential for misunderstanding and conflict between cultures whose approaches to self-presentation and interaction are dissimilar.

Teacher and Student Conflict

Teachers and students may become involved in conflict around the cultural difference issues described above. In addition, teacher and student conflict may result from cultural differences in style of learning (Grubbs & Dozier 23–45; Harris et al. 413–31). For example, teachers unaware of introspective cultural styles might misinterpret a low level of participation as a lack of understanding or even as defiance, inadvertently threatening students from Asia and elsewhere; and the teacher's persistence may only intensify students' discomfort.

A first step in reducing cultural conflict is to bridge the gap between the student and school-staff cultures, with educators going beyond their teaching responsibilities to include informal, noninstructional social interaction. Familiarity will decrease educators' "outsider" images; give them a means to learn the cultural habits and problems of their students; enable them to develop their skills for anticipating cultural conflicts and for intervening in positive, appropriate ways; and increase their influence as familiar and sensitive role models for all students. Informal social interaction with students will also facilitate the teacher's formal role, since new cultural knowledge can be used to develop multicultural curriculums that in turn will greatly enhance students' cultural sensitivity.

School administrators can facilitate the development and maintenance of conflict-free, yet culturally diverse, schools in several ways. One is to openly acknowledge any culturally based problems the school might have and institute programs designed to build positive relationships among all students, parents, and teachers. Another way is to provide teachers with seminar programs and other experiences that will increase their knowledge of, and ability to manage and teach, diverse student populations, at the same time motivating teachers to develop informal relationships with students as described above.

Since people do not give up their cultural beliefs and habits through coercion, formal school rules and codes of behavior as the first means of intervention are likely to intensify rather than ease school problems rooted in cultural misunderstandings. But a "relationship-building" intervention strategy is effective—one where formal rules and codes are not discarded but rather tempered by an understanding of cultural differences and positive relational efforts to resolve them. ◆

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Student Forum

Amendment 28: Protecting Diversity

Gayle Mertz

To the Teacher
The Student Forum is a student-organized open discussion of a legal issue. Your role is to provide copies of materials to the students and to serve as a consultant. The forum is expected to take from two to five class periods depending on the number of characters included and the amount of discussion involved. Copy and distribute forum pages 43–46 to each student. You will need two copies of the ballot on page 46 for each student.

This Student Forum is an opportunity for you to take charge of your own learning. The forum is similar to a town hall meeting in which people come together to discuss ideas and issues. In the forum, you will consider a proposed amendment to the U.S. Constitution. The amendment reads:

> **All persons born or naturalized in the United States shall enjoy their government's commitment to the preservation and enhancement of cultural diversity. No state shall make or enforce any law that abridges the fundamental right of citizens of the United States to freely and proudly express their diversity. No rights or opportunities shall be denied based on such expression.**
>
> **Congress shall have power to enforce, by appropriate legislation, the provisions of this article.**

You will also examine your personal views on the subject.

Before the forum begins, you will complete a ballot to identify your attitudes about the proposed amendment. Following the forum, you will complete another ballot to determine whether your attitudes have changed.

How to Conduct a Forum

1. The class selects five students to serve on the forum panel.
2. All students complete the pre-forum ballot and submit it to the panel.
3. All students form groups to develop or adapt character sketches for the forum.
4. The class members identify community members that they would like to invite to participate in the forum. With the teacher's permission, panel members invite guest speakers to the forum.
5. The panel selects student volunteers to serve as facilitator and clerk. It also identifies the students chosen to role-play the characters.
6. The clerk schedules the presentations of the characters and the guest speakers.
7. The students conduct the forum.
8. The class members discuss what policies they would implement.
9. All students complete the post-forum ballot. The panel reviews, compares, and summarizes the results.
10. The panel submits the tally to the American Bar Association.

Getting Ready

To prepare for the forum, become familiar with the language used in the Bill of Rights; observe how language is used to refer to people (1st, 4th, 5th, 6th, 14th, and 15th Amendments); read two or more of the articles in this issue of *Update on Law-Related Education.* Then, as a class, brainstorm viewpoints for and against the proposed amendment. The facilitator will chart the viewpoints on the board.

As a class, identify community members whom you would like to invite to participate in the forum. You might ask some professionals to testify at the forum; for example, a civil rights attorney, a school district diversity coordinator, an affirmative action administrator.

Organize into an even number of groups of up to five students. With your group, choose a viewpoint for which you will develop a character. Make sure that an even number of pro and con viewpoints are chosen by the groups.

Develop and write a character sketch to promote your viewpoint. These pages include sample character sketches. You may use or adapt these sketches or create your own. Your character sketch should include the character's name, a specific viewpoint on the proposed amendment, background informa-

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Gayle Mertz is a free-lance writer and the director of the Safeguard Law-Related Education Program in Boulder, Colorado.

tion about the character that supports the viewpoint, and a request for a specific policy position to be adopted. After you have developed the character sketch, select a group member to play the character's role in the forum. Give a copy of your character sketch to the panel, and tell the panel who will role-play the character.

Student Roles

Panel

The panel organizes the forum. Members tally and submit the results of the pre-forum and post-forum ballots. The panel sends ballot data to the ABA. It invites community members to participate in the forum upon recommendations from the class. It reviews and selects characters to be included in the forum and selects student volunteers to serve as clerk and facilitator. It provides a list of student and guest participants to the clerk. During the forum, panel members serve as members of the audience.

Clerk

The clerk receives a list of characters and guest speakers from the panel. The clerk then schedules the speakers for the forum. She or he may organize the presentations so that, for example, each pro position is followed by a con position or all pro positions are presented first followed by all con positions. The clerk presents the schedule of speakers to the facilitator. During the forum, the clerk may wish to take notes.

Facilitator

The facilitator opens the forum with a statement of purpose, such as "to explore whether the U.S. Constitution should be amended to preserve and protect cultural diversity." The facilitator calls on speakers to present their arguments in a five-minute period. He or she times the presentations and encourages audience members to ask questions and participate in a discussion of the issues. The facilitator closes the forum.

Audience

The audience (students who have not assumed roles as clerk, facilitator, or characters) participates by listening to testimony, asking questions, and discussing the issues.

Characters

Characters have five minutes to testify about their experience, viewpoint, and recommendation. They are questioned by the audience and should answer consistently within their role.

Character 1 My name is Michael Tymkovich. I have studied the U.S. Constitution for many years, and I want to explain how our Constitution has been changed in the past to reflect our evolving respect for diverse peoples. It is time for us, once again, to revise this document to bring it into alignment with the character of this nation.

The drafters of the Constitution and Bill of Rights were very similar to one another. They were educated and Anglo-European, and they were all men. The only constitutional reference they made to people other than themselves is found in Article I, Section II: *"Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons."*

It wasn't until after the Civil War that additional Amendments to the Constitution addressed, and attempted to remedy, injustices imposed on some groups. In 1868, for example, the Fourteenth Amendment was passed, and it changed the Constitution to read: *"Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, [excluding Indians not taxed]."* (Bracketed material was set aside by later Amendment.) This and other Amendments addressed problems specifically related to the states' limiting equal protection and due process rights. They did not address the rights of diverse groups of people, but the rights of individuals who were members of minority groups.

The U.S. population has changed significantly in the past century. We are no longer a melting pot but a nation of many diverse populations who are proud of, and want to protect and promote, their unique identities. It is time to once again amend the Constitution to institutionalize our support for the diversity that now characterizes our population.

Character 2 My name is Henry Chin, and I work for the U.S. Census Bureau. Therefore, I am well qualified to comment on the socioeconomic changes that we are witnessing in this nation. In 1990, the U.S. Census uncovered a wealth of data that demonstrate just how diverse a nation we have become, and the disparities within which we live.

Many people will look at the proposed constitutional amendment and think about our changing ethnic and cultural diversity. From the census data, they can cite statistics that tell us that between 1980 and 1990, there was a 53% increase in the number of people who identified themselves as of Hispanic origin, and a 54% increase in those who identified themselves as Mexican. They can tell us that 15% of the students in the New York City Public Schools are not proficient in English. The students speak many different tongues—including 90,000 who speak primarily Spanish, 13,000 who speak Chinese, 7,000 who speak Haitian Creole, 5,000 who speak Russian, and 500 who speak Farsi.

And the 1990 census revealed many problems. We know that black teenagers are six times more likely than whites to be fatally shot by someone else, but half as likely to take their own lives with a gun. We know that, in the past decade, births to unmarried women soared about 75%. More households owned three vehicles than those that owned one vehicle; yet home ownership declined for the first time in 50 years, while crowding and poverty increased.

There is much more that we can learn from the census data. But the important point that I want to make is that amending the Constitution will change nothing. Respect for cultural diversity must come from the people themselves, and solutions to socioeconomic problems must come through legislation by our elected officials. Amending the Constitution will only hold out an empty promise to decent people who deserve better.

Character 3 My name is Sherman Free Soul. I am a member of an Iroquois Nation, and my ancestors inhabited this land long before the invasion by Europeans. I strive to live my life in a manner that is consistent with the values and traditions of my ancestors. The actions of the U.S. government make it more and more difficult for me to do so. My children attend schools where they do not learn about their culture and the role that our tribe played in the founding and development of this nation. For example, Benjamin Franklin sent a delegation to visit the Iroquois Nation to learn about our confederacy, and that information was used to help them write the U.S. Constitution. As you can see, our contributions have been great.

My children are growing up in an environment in which their culture is not respected. The United States creates an artificial boundary for my people. Many members of my tribe live in Canada, where their cultural heritage is respected and protected by law. The Canadian Charter of Rights and Freedoms, which is part of the Canadian Constitution, states: "*This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.*" I think that it is time to amend the U.S. Constitution to include similar protection.

Character 4 My name is Martha Alexander, and I am a member of America for Americans. We are a national organization that provides educational programs to teach people about this nation's history and founding principles. America has provided a safe haven for people throughout the world at times when their own countries denied them freedom and safety. People have come to our shores to find a better life, one where they can raise their families free of conflict. In the past 100 years, we have taken in people from every continent. All these people should stand ready to become Americans and forsake those nations and cultures that they abandoned.

America for Americans believes that the liberty, freedom, and resources that U.S. citizens enjoy should be reserved only for them. This is why we mobilized in California this fall to support Proposition 187, which denies illegal aliens schooling, social service, and most medical care.

People who understand this nation's history know that this is the land of freedom, and will always be so. The same freedom and liberty are offered to every person who legally enters our country. There is no need to change the Constitution, which has served us well for over 200 years, as it already contains the necessary protection for persons of diverse cultures. Instead, we should be protecting U.S. citizens from obvious inequities, such as in California, where taxpayers are paying $2.4 billion a year to provide for 1.7 million illegal aliens.

Character 5 My name is Juanita Garcia, and I am a high school junior. At my school, only 7% of the students are Latino or Latina. There are only two Latina teachers out of a faculty of over 50. I am always aware of how different I am from the majority of students. I still have an accent and am uncomfortable speaking publicly. My parents do not attend school functions because they do not speak English well, and they do not look like the other students' parents. I am proud that I am still in school and I plan to graduate. It is very important to my parents for me to receive a high school diploma because they never had a chance to do so. However, my high school has a dropout rate of more than 50% for Latino students. Anglo students drop out at a rate of only 6%. Many of our parents came to this country so that their children would have better opportunities than they did. But we do not really have the opportunity to receive a high school education if we always feel uncomfortable at school.

I believe that passage of the proposed constitutional amendment will send a message to everyone in the United States that my friends, family, and I are respected and valued as much as anyone else in this country. We are willing to work hard, and we are good citizens. We deserve the same respect and opportunities as everyone else. ◆

FORUM BALLOT

Respecting and Protecting Diversity: What Should the U.S. Government Do?

Circle the choice that best answers how you feel about the issue.

	strongly agree				strongly disagree
I believe all public schools should					
1. Make diversity-sensitivity training a graduation requirement.	1	2	3	4	5
2. Incorporate multicultural perspectives into the teaching of all classes.	1	2	3	4	5
3. Only hire teachers who have been trained to work with diverse populations.	1	2	3	4	5
4. Expel students who demonstrate intolerance for minority groups.	1	2	3	4	5
5. Maintain a library that provides resources about all cultures and lifestyles.	1	2	3	4	5
6. Prohibit speech that is hostile to any minority group.	1	2	3	4	5
I believe all law-making bodies should					
7. Include a diversity clause in every bill that is passed, just as we include safety or budget clauses now.	1	2	3	4	5
8. Allocate funds to equally serve diverse ethnic, racial, and lifestyle groups.	1	2	3	4	5
9. Enhance punishment for bigotry-based criminal behavior.	1	2	3	4	5
10. Require diversity-sensitivity training for all elected officials before they take office.	1	2	3	4	5
I believe justice system agencies should					
11. Be required to hire staff proficient in the languages spoken by the populations served.	1	2	3	4	5
12. Broaden the jury selection process to insure greater diversity in jury pools.	1	2	3	4	5
13. Require diversity-sensitivity training for all staff.	1	2	3	4	5
14. Dismiss personnel who violate diversity-sensitivity standards.	1	2	3	4	5
15. Provide documents and literature to the public in each language read by the populations served.	1	2	3	4	5

Complete the sentences below based on your personal opinion.

16. The most useful and effective measure that the government can take to promote multicultural unity in schools is to

____

17. Lawmakers will serve the best interests of all cultural groups if they would

____

18. The most valuable thing that the justice system agencies can do to enhance equal treatment and respect for all cultural groups is to

____

Know These Terms

Constitutional amendment Constitutional amendments may be proposed by a two-thirds vote of each house of Congress or by a national convention called by Congress at the request of two-thirds of the states. To become part of the Constitution, amendments must be ratified, or approved, by the legislatures of three-fourths of the states, or by conventions in three-fourths of the states.

Due process This basic legal principle, which appears in the 5th and 14th Amendments, requires the government to be fair in its dealings with people. The Amendments forbid federal, state, and local governments from depriving people of "life, liberty, or property, without due process of law."

Equal protection under law This phrase from the 14th Amendment means that no person or class of persons may be denied the same protection of the laws that is enjoyed by other persons in similar circumstances.

Fundamental right This is a right explicitly or implicitly guaranteed by the Constitution.

Naturalized citizen of the United States This person has completed the process of acquiring U.S. citizenship and so has become entitled to all privileges of citizenship.

Instructional Resources

Paula Nessel

BOOKS

American Bar Association. ***A Teacher's Guide to the Bill of Rights Poster Series.*** **Chicago: American Bar Association Special Committee on Youth Education for Citizenship, 1991.**

This collection of teaching activities for elementary, middle, and high school levels addresses five themes from the Bill of Rights: freedom of religion, freedom of speech, the right to assemble, the right to counsel, and equal protection. 56 pages. Cost: $5.00 plus handling, PC #497-0029. To order, contact: ABA/YEFC, 541 N. Fairbanks Ct., 15th Fl., Chicago, IL 60611-3314, 312/988-5735.

American Bar Association. ***That Delicate Balance II: Our Bill of Rights. An Instructor's Guide.*** **Chicago: American Bar Association, 1994.**

Within this guide to the five-part PBS series on videotape (below), Program Two (pages 13–20) is devoted to discussion of and activities relevant to issues raised by the First Amendment and hate speech. 48 pages. Cost: $10.00 plus handling, PC #497-0052. To order, contact: ABA/YEFC at address above.

Avery, Patricia, Dorothy Hoffman, et al. ***Tolerance for Diversity of Beliefs: A Secondary Curriculum Unit.*** **Boulder, Colo.: Social Science Education Consortium, 1993.**

Case studies, role plays, simulations, and mock interviews are used to explore issues associated with freedom of belief and expression and minority rights. 109 pages. Cost: $17.95 plus $3.50 postage. To order, contact: Social Science Education Consortium, 3300 Mitchell Ln., Suite 240, Boulder, CO 80301-2272, 303/492-8154.

Canby, William C., Jr. ***American Indian Law in a Nut Shell.*** **St. Paul, Minn.: West Publishing Co., 1988.**

An easily understood outline of American Indian law as it applies to reservation-based Indians in the lower United States and the U.S. governmental policies underlining the law. 336 pages. Cost: $19.88 plus handling. To order: call 800/328-9352.

Close Up Foundation. ***The First Amendment: America's Blueprint for Tolerance*** **and** ***The First Amendment: America's Blueprint for Tolerance Teacher's Resource.*** **Alexandria, Va.: Close Up Foundation, 1994.**

The student text (40 pages) and teacher's resource (100 pages) present the history of the First Amendment and address current controversies about the First Amendment and tolerance, such as speech codes at universities, hate crimes, and sexual harassment. Cost: text $7.95, teacher's resource $14.95; plus handling. To order: call 800/765-3131.

Constitutional Rights Foundation Chicago. ***Working Together: Lessons in Justice.*** **Chicago: Constitutional Rights Foundation Chicago, 1994.**

Upper elementary teachers of social studies can use these lessons in teaching about tolerance, nonviolence, role models, and how government works. Included are "No Weapons Allowed," "Who Does What in Broccolia," and "The Illinois" (about the people who were the namesakes of the state). Background information about LRE, interactive learning, and use of outside resource persons (ORPs) is included. Cost: $12.50 or $11.50 for five or more copies. To order, contact: CRFC (see above).

First Amendment Congress. ***Education for Freedom: Lessons on the First Amendment for Secondary School Students.*** **Denver: First Amendment Congress, 1991.**

This series of lessons can be used as a unit or separately to educate students about their First Amendment rights. Each lesson is followed by suggestions for enrichment/extension and (for elementary) related children's literature. An extensive bibliography is included. Cost: $25 plus handling for either K–6 or 6–12 lessons; a videotape and guide cost $7.50 plus handling. To order, contact: First Amendment Congress, 1445 Market St., Suite 320, Denver, CO 80202, 303/820-5688.

Guinier, Lani. ***The Tyranny of the Majority: Fundamental Fairness in Representative Democracy.*** **New York: The Free Press, 1994.**

The author has written a lengthy essay discussing her views on civil rights, outlining both the historical precedents for her legal arguments and showing how they were distorted by her critics when she was nominated for the office of U.S. assistant attorney general. Also included is a collection of her law journal articles written between 1988 and 1993. 308 pages. Cost: $24.95. ISBN #0-02-913172-3. To order: call 800/323-7445.

Hess, Diana. ***Punishing Hate—Protecting Speech: Democracy's Dilemma.*** **Chicago: Constitutional Rights Foundation Chicago, 1994.**

A multilesson supplementary unit for grades 9–12 analyzing how hate crimes have increased in America, how laws against hate crimes have been developed, whether hate crime laws violate the First Amendment, how public school policies are designed to prevent hate in the classroom, and how people can promote tolerance in their communities. 70 pages. Cost: $12.50 plus handling. To order, contact: Constitutional Rights Foundation Chicago, 407 S. Dearborn, Suite 1700, Chicago, IL 60605, 312/663-9057.

Patrick, John J. ***The Young Oxford Companion to the Supreme Court of the United States.*** **New York: Oxford University Press, 1994.**

Using an encyclopedia format, this resource for ages 12 and up includes detailed discussions of 100 landmark cases and essays on key topics and issues in American constitutional law. 368 pages. Cost: $25 plus shipping. ISBN #0-19-507877-2. To order, call 800/451-7556.

Pepper, Floy. ***Indian Treaties and the Law: An Oregon Curriculum.*** **Portland, Ore.: Classroom Law Project, 1989.**

In this overview of the historical relationship between American Indian tribes in Oregon and the federal government, fishing rights are used to demonstrate how treaties and legislation affect Indians and non-Indians today. Cultural and historical background, simulations, and other classroom activities for middle and high school students are included. Cost: $10.00 plus handling. To order, contact: Classroom Law Project, 6318 SW Corbett, Portland, OR 97201, 503/245-8707.

Paula Nessel is the project coordinator for the ABA National Law-Related Education Resource Center.

Instructional Resources - *continued*

Pevar, Stephen L. *The Rights of Indians and Tribes: The Basic ACLU Guide to Indian and Tribal Rights.* 2d rev. ed. Carbondale: Southern Illinois University Press, 1992.

In language appropriate for non-lawyers, the author provides in-depth coverage of issues such as tribal self-government; state and federal power over Indian affairs; civil and criminal jurisdiction in Indian country; taxation; hunting, fishing, and water rights; and the civil rights of Indians. 352 pages. Cost: $7.95 plus $2.75 handling. To order, contact: Southern Illinois University Press, P.O. Box 3697, Carbondale, IL 62902, 618/453-6619.

Schimmel, David M., and Lewis Fischer. *Freedom, Fairness and Equality.* Washington, D.C.: Phi Alpha Delta Public Service Center, 1994.

Formerly published as *Bicentennial Guide for Lawyers & Teachers* (1991), this new edition explains due process, equal protection, freedom of expression, and freedom of religion using historically significant as well as up-to-the-minute Supreme Court cases. Cost: $12.00 plus $2 handling. To order, contact: Phi Alpha Delta, 1511 K St., NW, Suite 611, Washington, DC 20005, 202/638-2898.

PERIODICALS

"First Amendment: *R.A.V. v. St. Paul.*" *Update on the Courts,* vol.1, no. 1 (Fall 1992): 9–11.

A handmade cross set on fire by white juveniles in a black family's front yard led to this Supreme Court case addressing whether a city ordinance banning such behavior violated First Amendment rights to free speech. The case's facts and issues are examined and the decision summarized. (This out-of-print issue of *Update on the Courts* is accessible through ERIC\ChESS.)

"From the Editor: An Open Letter to Lani Guinier," by David S. Bernstein. *Diversity & Division: A Critical Journal of Race and Culture,* vol.2, no.4 (Summer 1993): 3–4.

An argument against Guinier's ideas of political authenticity and proportional representation in elected bodies. Cost: postal costs only, in limited quantities. To order, contact: *Diversity & Division,* 1155 15th St., NW, Suite 712, Washington DC 20005, 202/833-1801.

***Life,* vol.14, no.13, Fall 1991 (special Bill of Rights issue).**

"First and Foremost," pp. 60-66, outlines 75 years of key Supreme Court cases addressing issues raised by the First Amendment.

"The Case for Hate," pp. 88-91, profiles the cross-burning incident and subsequent court case that led to the Supreme Court case *R.A.V. v. St. Paul, Minnesota.* (This out-of-print issue should be available at local libraries.)

***Scholastic Update,* vol.124, no.14, April 3, 1992 (topic: Hate in America)**

The controversy over punishing expression ("Law—You Decide/Freedom of Hate Speech?" pp. 17–19), the laws addressing hate crimes ("Government/Getting Harsh with Hatred" p. 13), and teaching tolerance in the classroom ("Sociology/Learning to Live Together" pp. 21–22) are among many articles in this issue that address aspects of hate crimes. (This out-of-print issue should be available at local libraries. Photocopies of articles can be obtained free of charge from: Scholastic Inc., 555 Broadway, New York, NY 10012, Attention: Library, 212/343-6179.)

***Teaching Tolerance* magazine.**

The Southern Poverty Law Center created this magazine to provide teachers at all levels with resources and ideas for promoting interracial and intercultural understanding in the classroom. Each issue includes ready-to-use ideas and strategies for helping children learn the benefits of tolerance. No charge to teachers. Send request on school letterhead to: Teaching Tolerance, 400 Washington Ave., Montgomery, AL 36104. FAX: 205/264-3121.

COMPUTER SOFTWARE

***Express Yourself: The First Amendment.* San Francisco: ACLU-Northern California, 1992.**

A lively combination of video, animation, music, graphics, and text is used to explore First Amendment issues as they relate to secondary students today. Macintosh compatible only. A national updated version is due in January 1995. Cost: free to students and educators; $10.00 to others; may be copied. To order, contact: Public Education Dept., ACLU, 132 W. 43d St., New York, NY 10036, 212/944-9800.

***The Research Companion: Supreme Court Decisions.* Garden City, N.Y.: Focus Media, 1987.**

Users play the role of a law student or a legal assistant to a Supreme Court Justice who is conducting constitutional law research. Appropriate for high school level, this Apple/Macintosh-compatible program includes access to approximately 50 landmark cases dealing with such topics as the First Amendment, discrimination and equal protection, search and seizure, the right to counsel, and rules of evidence. Cost: $119.00. To order, call 800/421-4246

VIDEOTAPES

***American Tongues.* New York: New Day Films, 1986.**

This video explores issues of prejudice, difference, and tolerance through the words of a broad spectrum of Americans. In a fast-paced "road trip" that witnesses myriad speech patterns, the viewer learns how some accents have triggered discrimination on both personal and professional domains. Level: grades 5–12; length: 40-minutes. Cost: sale $285; rental $85; with study guide. To order, contact: New Day Films, 22-D Hollywood Ave., Hohokus, NJ 07423, 201/652-6590.

***The Black Hills: Who Owns the Land?* Lincoln, Neb.: GPN, 1986.**

A two-part series: "The Treaty of 1868" focuses on the original treaties and the radically different philosophies of the signers—the U.S. government and the nomadic Lakota Sioux. "Black Hills Claim" highlights the physical and legal battles waged to gain and regain the Black Hills from the 1770s to the present. Level: secondary–adult; length: 30 minutes each. Cost: $59.95 for the series plus 6.5% shipping (order #286); $39.95 per video. To order, call: 800/228-4630.

Crimes of Hate. **New York: Anti-Defamation League, 1992.**

The twisted thinking of perpetrators of hate crimes, the anguish of their victims, and how law enforcement deals with such crimes are the focuses of this documentary. Included are an overview of hate crimes and segments on racism, anti-Semitism, and gay bashing. Level: secondary; length: 27 minutes. Cost: $50.00 plus $7.00 for shipping. To order, contact: ADL Film Library, 22-D Hollywood Ave., Hohokus, NJ 07423, 800/343-5540.

"The First Amendment and the Ku Klux Klan." Lincoln, Neb.: GPN, 1988.

From the 6-part series *Here and Now,* this video explores First Amendment issues in the context of a city's abolishing a public access cable channel to prevent the Ku Klux Klan from doing a weekly TV show. Level: secondary; length: 12 minutes. Cost: $219.95 for the series; $44.95 per tape plus 6.5% shipping; $2.75 for a teacher's guide. To order, call: 800/228-4630.

"The Official English Movement." Lincoln, Neb.: GPN, 1988.

From the 6-part series *Here and Now,* this video explores the movement to make English the country's official language, focusing on bitter campaigns in two states. See above.

The Right to Be Mohawk. **New York: New Day Films, 1989.**

The differences in values held by the Mohawks and the predominant American culture are examined, beginning with the sale of Manhattan and continuing to the present. The program describes the Iroquois Confederacy, one of the most creative and efficient forms of government, and profiles the 1794 treaty with the Mohawk Nation and the U.S. government's failure to comply with it. Level: grades 5–12; length: 17 minutes. Cost: sale $250.00; rental $50.00. To order, contact New Day Films (see above).

Skokie: Rights or Wrong—A Film About Freedom of Speech. **New York: New Day Films, 1987.**

Citizens of Skokie, Illinois, many of whom were concentration camp survivors, attempted to outlaw an American Nazi rally in their town. The Nazis called on the American Civil Liberties Union to defend their First Amendment right to speak and demonstrate—even in Skokie. Level: middle-secondary; length: 28 minutes. Cost: $150.00, including study guide; rental available. To order contact New Day Films (see above).

That Delicate Balance II: Our Bill of Rights. **New York: Columbia University Seminars on Media and Society, 1992.**

In Part 2 of this 5-part series, panelists, including Robert Bork (former U.S. Court of Appeals judge), Antonin Scalia (U.S. Supreme Court Justice), and Nadine Strossen (ACLU president), moderated by Arthur Miller (Harvard Law School professor), discuss the right to free speech, including offensive speech and conduct, attempts to silence controversial speech, and protection of symbolic speech. Level: secondary-adult; length: 60 minutes. Contact local PBS affiliate to see if the series will be rebroadcast. (PBS Adult Learning Service at 800/257-2578 can give licensing information.) Cost: $79.95/program plus shipping. To order, call 800/344-3337.

The Trial of Standing Bear. **Lincoln: University of Nebraska-Lincoln Television/Nebraska ETV Network, 1988.**

A docudrama depicting the story of Ponca Chief Standing Bear and the court case of 1879 in which a U.S. district court declared for the first time that "an Indian is a person within the meaning of the law"and therefore entitled to protection under the U.S. Constitution. The story follows the Poncas' forced relocation from their homeland in Nebraska to Indian Territory in Oklahoma and their efforts to return to their homeland in defiance of the U.S. government. Level: secondary—adult; length: 120 minutes. Cost: $39.95 plus 6.5% shipping. To order, call 800/228-4630.

OTHER MATERIALS

America's Civil Rights Movement

A free multimedia curriculum kit for secondary classrooms. Included are *A Time for Justice,* a 38-minute videotape; *Free at Last: A History of the Civil Rights Movement and Those Who Died in the Struggle,* a 104-page text; and a detailed teacher's guide. To order, send a request on school stationery to Teaching Tolerance at the address above.

"Hate Speech on Campus" ACLU Briefing Paper No. 16.

Suitable for high school students and adults, this paper explains the ACLU's defense of hate speech and outlines ways to counteract hate speech through education. Cost: 1.00; $5.00 for 25 copies. To order, contact: ACLU, Dept. of Public Education, 132 W. 43d St., New York, NY 10036, 212/944-9800.

"Your Right to Equal Treatment."

ACLU "briefer," appropriate for secondary students, featuring cartoon character Sybil Liberty, who answers questions regarding rights for diverse groups (e.g., gay, pregnant, and minority students). Cost (for teachers): $5.00 per 100 copies, plus $.75 per 100 for handling. To order, see ACLU above.

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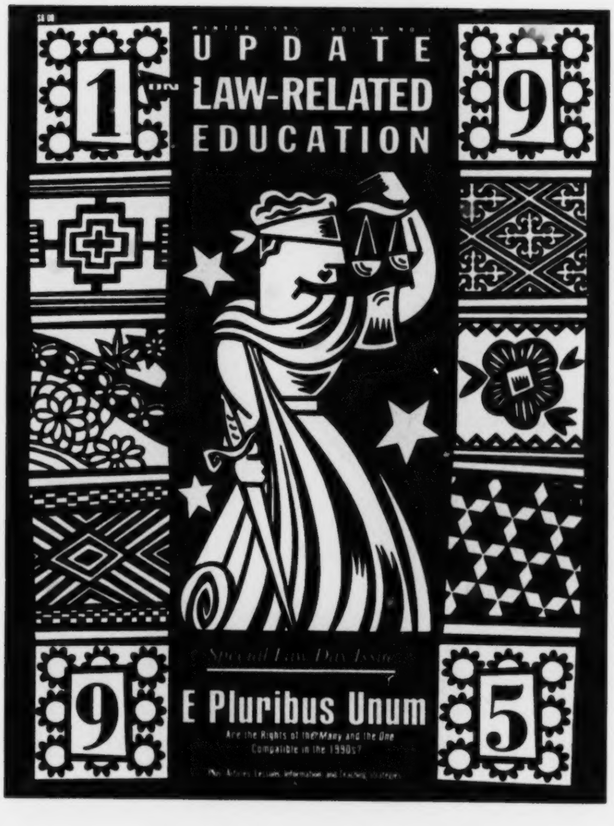

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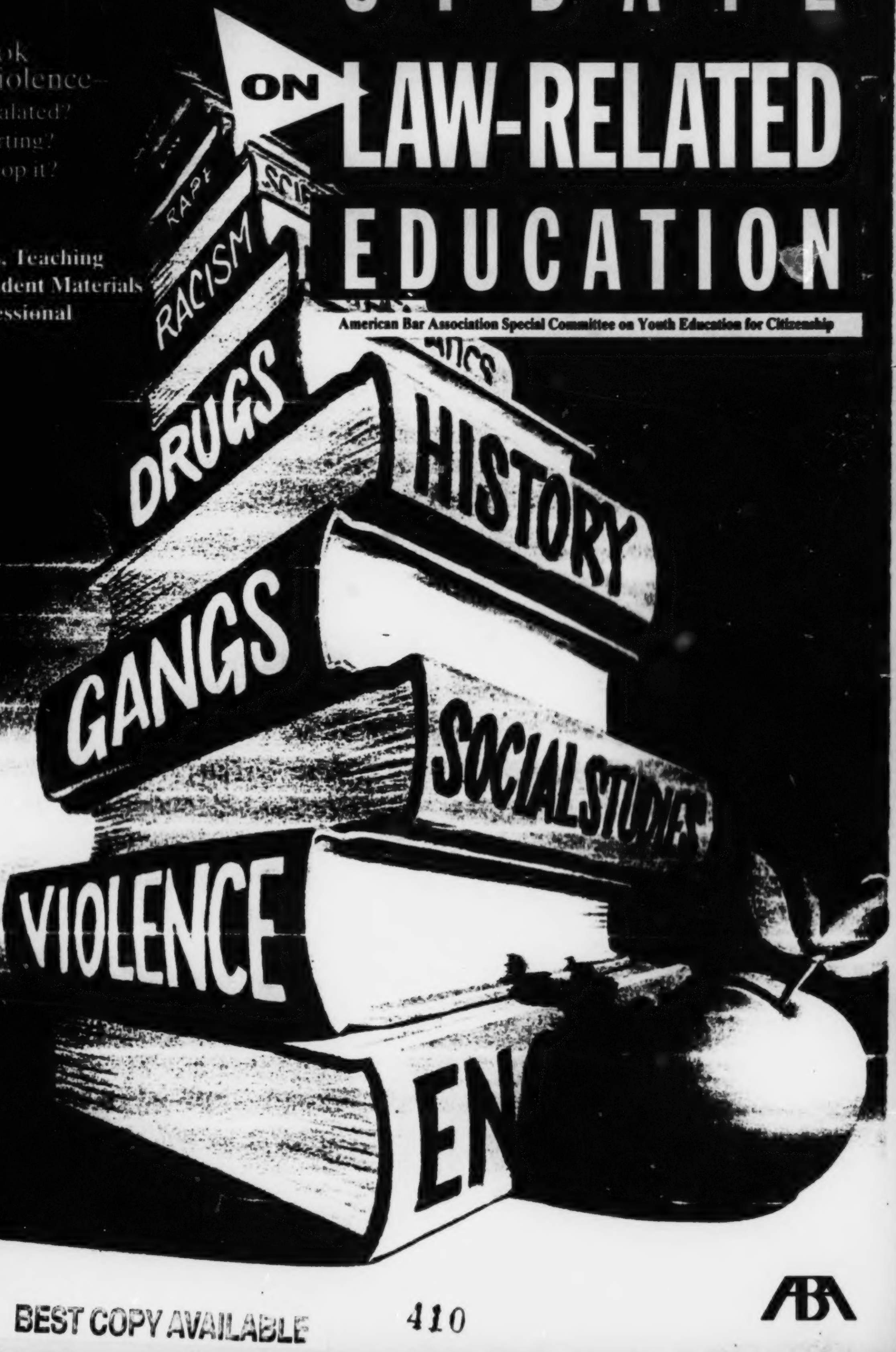
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What's Inside?

Why does my child need to know about this?
This will never happen to my child.
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The truth is, violent crime will never touch the lives of most schoolchildren. At the same time, the betrayal experienced by victimized youth is a tragedy that parents/guardians, educators, and friends can and must help them overcome.

This issue of *Update on Law-Related Education* is dedicated to giving adults and the children in their care needed tools for avoiding and surviving violence associated with attending school. Because of the controversial nature of this topic and its remedies, we urge educators to take extreme care in selecting and, as needed, adapting these materials for local use.

Parent groups regularly come forward vehemently opposing classroom introductions to crimes that they feel their children might not otherwise know about, or shouldn't hear more about from teachers. The position is that, notwithstanding the prevalence of types of violence in the media, some of these subjects and, for some parents, all these subjects are inappropriate for the classroom.

On the other hand, when teachers discuss drug abuse, gang violence, date rape, and related topics in class, they routinely find that they have one or two students who have personally experienced them and who seek help as a result of the classroom discussion.

The best policy is to be prepared. Talk with school administration about how to approach the topic of violence, in all its dimensions, at your school. Ask counselors and other support personnel how to help students who, after class, admit to using drugs, running with a gang, or experiencing date rape.

And be informed. We invite you to read the articles in this issue thoroughly and to use or adapt the teaching materials judiciously. When deciding what to share with your students, be advised that the articles especially contain candid discussion about situations that schoolchildren unfortunately encounter every day.

On behalf of the *Update* staff, I sincerely thank all our contributors, but especially Tim Buzzell of Drake University, who took on the difficult task of planning and preparing this issue as guest editor. The concern he has for the well-being of our nation's youth is evident in the comprehensive collection of compelling articles and effective teaching materials that he has taken care to furnish to our subscribers. I also thank Susan A. Hyatt, Staff Associate, Social Studies Education Consortium, Inc., in Boulder, Colorado, for serving as our reviewer. Her expertise and recommendations got us the extra "ten percent" we needed to be confident of the issue's quality and timeliness.

Seva Johnson

Seva Johnson
Editorial Director
Youth Education Publications

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Update helps classroom teachers and law-related education program developers educate students about the law and legal issues. The views expressed in this document are those of the authors and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association, the Fund for Justice and Education, or the Special Committee on Youth Education for Citizenship.

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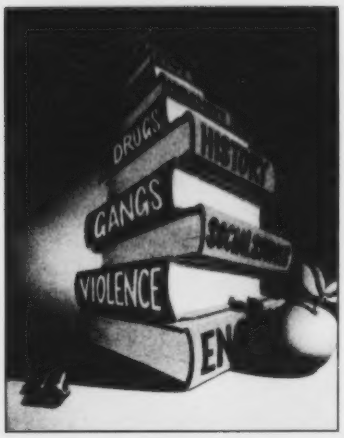

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Foreword

I keep asking myself, why are people so fascinated with the O.J. Simpson trial? There are a number of answers, I suppose. It's good entertainment, perhaps. There are elements of a mystery story, and it's all played out in the drama of a courtroom. Or maybe watching the clash of legal minds provides intrigue and suspense.

Yet I also think that this trial is taking place at a time when people are worried about crime and safety. Maybe a sense of satisfaction comes with watching those accused go through "the process." Maybe there is some consolation that justice in America does work, and that our system of rules brings order to a modern, violent world.

I've asked students I've worked with what they find most interesting about the O.J. Simpson trial. Much as their parents, they point to its entertainment value and intrigue. Yet, when we move past the pop culture, I find that students are also worried about their safety. They talk about assaults in the school hallways, gangs of bullies, and the ever-present dangers of drugs. Kids are looking for a sense of order too; and, even though the televised trials of the day may not be the best instructional method for learning about law, there is a feeling among teens that our system of law and justice achieves an important purpose. Moreover, they understand that law arises from the need to bring order and civility to complex societies.

This special *Update* edition focuses on school violence in America from a different perspective, one that provides teachers and students with a more critical consideration of the problem by asking important questions about the idea of law and self-governance. The goal here is to shift how we think about school violence away from the sensationalism and the "O. J. Simpson hype" to a consideration of violence as an outcome of conditions typically related to student experiences at school.

School relationships of many kinds develop within a context of overlapping environments that govern behavior in numerous ways. Many of the articles and strategies here will make students and teachers more aware of how we govern our own behaviors in a variety of informal and more formal settings.

And no discussion of self-governance is complete without due consideration of the idea of law. If school order is to be maintained, students and teachers must attend to how formalized structures of rules and laws are put into practice. Even more important is that young people have a role to play in the maintenance of school order, one that is unfortunately overlooked by many adults.

An informed discussion is the starting point for creating proper solutions. To this end, Professor Rick Van Acker has contributed our opening article, which explains the general nature of violence in our society, the types of violence found at school, and prevention and treatment methods for each. Following are articles and strategies that individually treat types of school violence.

A school is a miniature society that often mirrors the dynamics of the surrounding culture. Sociologist Thomas Regulus focuses on *situational violence*, with an emphasis on understanding how cultural diversity, the emergence of violent student cultures, and the role of school rules or governance all interact to crystallize situations that are sometimes violent. Barbara Miller offers a teaching strategy designed to help young people better understand the situational nature of their neighborhoods and communities and develop a realistic picture of the normative environment in which they live.

Today, *relationship violence* unfortunately touches the lives of many high school and college students. Professor Lisa Waldner-Haugrud informs our thinking about this issue by asking what we know about dating violence and date rape. Pat Larson and

Roxann Ryan's accompanying lesson encourages students to think about sexual coercion and ways to apply the law in varying situations.

The teaching strategy by Kip Lowe explores the consequences of *predatory violence* from the victim's perspective. Special attention is given to understanding and avoiding teen victimization.

The focus next turns especially to solutions to school violence that are organized around typical LRE themes including self-governance, the application of law and justice, and civic responsibility. Professor Richard Roe begins with an overview of the crime and punishment debate that has challenged policymakers for years. His discussion of the purpose of the criminal justice system in America challenges us to consider a number of more effective alternatives to punishment.

Another approach to school violence involves governing the tools of violent behavior or developing policies and rules that target what students may bring to school. How can schools implement site-based gun-control policies? What options do teachers and administrators have? The report from June Lane Arnette at the National School Safety Center includes suggestions and information from nationally recognized experts.

LRE can be used in a variety of ways to address school violence. Deb Williamson and Professor Paul Knepper introduce teachers and students to teen courts as alternatives to more traditional administrative school structures designed to deal with antisocial behaviors. Then John Wheeler describes how an Iowa school court was organized to emphasize responsibility, justice, and authority.

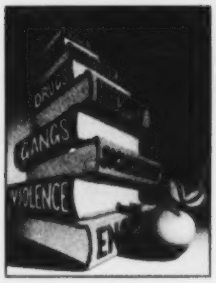
Students and teachers are part of a larger community that has its unique normative structure, laws, and forms of governing. Students should be encouraged to work on preventing community crime. In her article, Erin Donovan advocates for such teen involvement. Then Barbara Miller's strategy shows how to get young people involved in mapping the incidence of community crime.

Finally, Professor Frank Kopecky's challenging simulation encourages students to think about resource allocation to crime-prevention programs. This role-play emphasizes how difficult it is to respond to social issues with limited resources and competing philosophies about how to deal with crime.

Student learning should not be left only to high-profile trials and violence on TV. I encourage you to find ways to talk about the important issue of school violence, even though doing so may prove difficult at times. Think about your students' comfort levels with some topics. For example, the activity on date rape and the lesson on victimization may present personal challenges for teachers and students that you should be prepared to address. Violence is ugly in any form. Confronting the issues requires—and, fortunately, promotes—strength, sensitivity, and accuracy.

T L Buzzell

Timothy L. Buzzell, Ph. D.
Drake Law School
Des Moines, Iowa
Guest Editor



A Close Look at School Violence

An exploration into four types of violence displayed at school, factors that influence their display, and suggestions for prevention and intervention

Richard Van Acker

Update on Law-Related Education, 19.2, 1995, pp. 4–8. © 1995 American Bar Association.

Our schools are charged with the task of helping children become adults in the most violent nation in the industrialized world. More and more frequently, this violence is being perpetrated by and directed toward children and youth. The school, once thought to be a safe haven, is turning into a popular marketplace for criminal enterprises. Moreover, in far too many communities, poorly coordinated social services result in schools being isolated from other agencies charged with providing services to children and families.

Typically violent behavior includes serious and extreme behavior that is intended to cause physical harm to another person or to property. According to Bureau of Justice statistics, violent juvenile crime has increased substantially in recent years. Juvenile arrests for violent criminal behavior went up 41 percent from 1982–91. Not only have the rates soared, but so have the seriousness and lethality of the crimes. For example, the number of juvenile arrests for murder increased by 93 percent during the same reporting period.

That an increase in school violence has also been reported is therefore no surprise, with assault, theft, and vandalism frequently identified as serious forms. The Office of Juvenile Justice and Delinquency Prevention reports that in 1988, approximately three million attempted or completed assaults, rapes, robberies, and thefts occurred within schools or on their property, including 76,000 aggravated and 350,000 simple assaults.

While violence does occur and has increased in schools, they continue to be one of the safer places in our communities. The level of serious violence in schools, though more frequent, is far lower than elsewhere in society. In fact, the type of senseless violence that often becomes the focus of media reports is relatively rare in our schools. The California Department of Education showed that there were about 20 violent crimes reported per 1,000 students during the 1988–89 school year. Most were simple assaults without

Percentage of teachers reporting behavior as having occurred on their campus within a one-month period

Incident	%
Someone curses at another	94
Someone grabs another	88
Someone gets punched/slapped	85
Someone teased or made fun of	83
Property stolen without force	80
Verbal threat	74
Someone stared down	69
Property (other than automobile) vandalized	62
Ethnic conflicts	54
Sexual harassment	53
Bullying by gang	52
Fight resulting in need for medical attention	36
Automobile vandalized	35
Threat by someone on drugs	28
Someone cut with a sharp object	15
Robbery with force	12
Sexual attack	6
Someone hit/hurt with a weapon	4

Source: Adapted from M. J. Furlong, G. M. Morrison, and J. D. Dear, "Addressing School Violence as Part of Schools' Educational Mission," Preventing School Failure *38 (1994): 10–17.*

Richard Van Acker is an associate professor and chair of the special education area in the College of Education at the University of Illinois at Chicago.

weapons, minor thefts, or vandalism. The number of reported gun possessions translated to approximately one gun per school district per year.

Teachers report that other, subtler forms of violence are more typical at school. The chart on page 4 indicates the nature of aggressive and violent school behaviors. Michael Furlong and his associates asked teachers to indicate whether the listed behaviors were observed in their school over the past month. The results suggest that serious violent behaviors (for example, assault with a weapon or sexual assault) happen in only a small number of schools. Fighting, swearing, theft, and verbal threats were reported by the vast majority of teachers.

Obviously, extremely violent behaviors greatly affect the school environment. Nevertheless, less violent behaviors that happen more frequently detract from a positive learning atmosphere and may act as a catalyst for greater violence. The School Violence Advisory panel supports including verbal harassment and intimidation in the definition of school violence. Yet, even subtler types of behavior, such as psychological intimidation and harassment (for example, name calling and public ridicule), are conspicuous forms of violence to which students are frequently exposed but that receive little attention.

With the reports of increased school violence has come an explosion of media coverage addressing it. For example, between 1982–93, over 49 percent of articles in five major newspapers (the *Los Angeles Times, New York Times, Washington Post, Wall Street Journal,* and *Christian Science Monitor*) contained the key words *school violence*. The intensity of media coverage has resulted in increased public concern and demand for legislation, prevention efforts, and intervention programs.

Unfortunately, youth aggression and violence and the factors that cause their display are not well understood. Much of the media coverage seems to misrepresent their nature. Efforts to design appropriate, effective strategies to deal with them are hindered by our general failure to clarify their nature and extent. This paper will explore four types of youth-violence behaviors and the way they affect schools. Factors within schools that have been found to influence each type will be identified, and suggestions for their prevention and treatment discussed.

Four Violent Behaviors

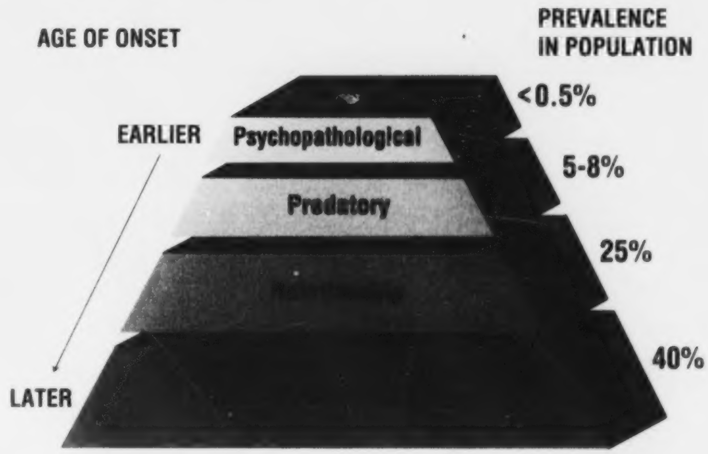
There are at least four types of youth violence: situational, relationship, predatory, and psychopathological. Each may result from differing conditions (for example, poverty and child abuse) that (1) expose the child to increased risk for developing aggression, (2) affect different segments of the at-risk population (younger versus older children or those in specific ethnic groups), and (3) may respond to differing prevention and treatment approaches. The diagram places them along a multidimensional continuum and proposes differences in the proportion of the population likely to display each type.

Situational Violence

Situational violence is thought to result from the interaction of personal frustration and the circumstances, setting, or environmental conditions that a person confronts. Situational violence is not rare; it is estimated that approximately 40 percent or more of the population will become involved in one or more acts of situational violence.

Situational factors may increase an individual's predisposition toward violence or the seriousness of a violent act. A number of situational factors have been identified as increasing the potential for school violence to occur. For example, violence increases when the weather is extremely hot or a school is extremely crowded. Seating and desk arrangements, the length of transition times between instructional activities, and the difficulty level and sequencing of tasks presented to students have also been linked to increased aggression and violence. For example, students may become aggressive or violent to escape tasks they feel are too difficult. Conversely, research suggests that teachers often give easy tasks to students known to

Four Types of Youth Violence



Source: Adapted from P. Tolan and N. Guerra, What Works in Reducing Adolescent Violence: An Empirical Review of the Field, *Boulder, Colo.: The Center for the Study and Prevention of Violence, 1994.*

act violently so as to avoid outbursts. In the former case, students are negatively reinforced for violence (they avoid the unwanted task), while in the latter, they are positively reinforced (they get an easy task). Similarly, frustration while attempting to pursue a planned event or the occurrence of an unavoidable accident may trigger a student's violent outburst.

Students who live in poor urban neighborhoods and who are members of racial, ethnic, or linguistic minorities are at greater risk of developing violent behavior. The schools in these areas are typically overcrowded and have poor resources. It's been suggested that higher rates of violence carried out by and toward minority youth reflect the powerful situational factors of social discrimination and oppression. Violent role models, handguns, alcohol, and drugs all increase youth violence in these communities.

Today's youth seem much more prone to displays of rage when confronted with situations in which they feel victimized or violated. Moreover, they seem to have a lower flash point at which these feelings trigger responses, and retaliation is often seen as the necessary response.

Prevention and Treatment

Perhaps teachers and other school personnel are best equipped to prevent episodes of school situational violence. Much of what is needed relates to the proactive (early, preventive) application of known educational models to establish a positive instructional climate—that is, an effective school. Teachers can easily adjust the physical setting, including room and seating arrangement, and the instructional materials used.

A schedule and sequence of activities that foster appropriate behavior should be established, as well as a variety of activities that are interesting and that balance the amount of seat work with more active tasks, since these may reduce the risk of situational violence. Curriculum modifications appropriate to individual abilities will ensure that academic tasks provide the challenge needed and that academic success is highly probable.

While setting modifications help prevent situational violence, they do not provide students with the skills needed to manage their behavior when frustrated. Teachers need to include instruction that helps students to understand situations that are likeliest to promote violence and to identify more socially appropriate ways to deal with frustration. Anger-management and anger-control strategies typically consist of relaxation training, self-talk, cognitive mediation, behavioral rehearsal, and practice controlling emotions and negative feelings in classroom social situations.

When students see school rules as arbitrary, unfair, and inconsistently applied, much more school violence is apparent. Student-management and discipline procedures must be selected that promote student responsibility and democratic practices.

Student perceptions of prejudice, bias, and unfair treatment by school personnel are intensified with the increased cultural, ethnic, linguistic, and socioeconomic diversity of many schools. These perceptions often lead to increased conflict, aggression, and violence. Minority students are significantly overrepresented in the number of students who are referred for special education and suspended, or expelled for disciplinary reasons, and who fail to complete school. Prevention programs for these students must be appropriate to their needs.

Relationship Violence

Relationship violence involves disputes between persons with ongoing relationships, especially friends and family members. It affects people of all ages and accounts for most of the violence in this country.

One-fourth of children and youth are thought to be directly affected by relationship violence, and it results in more than half of juvenile homicides. It is especially prominent in our schools, where disagreements between friends and acquaintances constitute the vast majority of disputes, arguments, and physical assaults. Dating violence is one example.

Relationship violence can erupt from any unusual crisis, but more frequently, it is displayed periodically as a characteristic of the relationship. There is also evidence that patterns of relationship violence are stable over time and can pass from one generation to the next. Violence between parents has been shown to increase violence in their children even if the children are not physically abused.

For a variety of reasons, children increasingly enter school without the skills necessary to manage their behavior, successfully interact with others, resolve conflict in a prosocial (socially positive) way, and generally navigate the difficult waters of social problem solving. A number of researchers suggest that aggressive children frequently distort socially benign (nonaggressive) situations, mistakenly attributing hostility to others. They resort to antisocial and aggressive solutions too frequently modeled in their environment (family, community, and/or media).

Student peer groups or social networks have been shown to influence student aggression and violence. Aggressive students bond and hang out together during and after school. Their pattern of social interaction frequently differs from that of other students. For example, during recess and after school, aggressive peer groups spend significantly less time in structured games and activities. Members reinforce one another's beliefs and attitudes about aggression and violence. These normative (shared) beliefs support continued involvement in violent behavior so that their violence may increase over time.

The relationships between students and their teachers also may provoke violent behavior. Research generally suggests that teachers verbally reprimand far more than they praise students. This is especially true for the students most at risk for aggressive and violent behavior. When confronted with resisting students, teachers often become nervous. Their judgment may be influenced, and they may respond with greater resistance themselves, as well as arbitrary punishments, threats, and sarcasm. Students react with increased hostility or violent acts, confirming teacher (and peer) expectations. This power struggle is becoming far too common in schools, which seem to demand more than ever from students who are perhaps less prepared than ever to meet that demand.

Prevention and Treatment

Programs aimed at reducing school violence must address its interpersonal nature. Just as academic skills such as reading and math are taught, social problem solving and conflict resolution must be taught systematically, with students given frequent opportunities to practice. This is the only way we can hope to have these skills replace the aggressive and violent patterns that have often become automatic for many youth.

Social problem solving and conflict resolution can become part of any course whose content involves attitudes and/or values. Reading, social studies, history, and other traditional classroom subjects provide fertile ground for development of these skills. For example, in the Student Training Through Urban Strategies program, students at risk for aggression are enrolled in a combined English/social studies class to increase their legal and social awareness while increasing their enthusiasm for learning, as reported in Gottfredson.

Since violence is often displayed within and learned through family relationships, family-living courses also must address family violence as a critical curriculum component. Hypothetical conflict or social problems can be presented to student groups for additional practice at problem identification, moral reasoning, social perspective taking, role playing, and the formulation of solutions. All these strategies have been reported as effective approaches to intervention. In addition, cooperative learning, reciprocal teaching, and cross-grade peer tutoring give students an opportunity to develop and practice prosocial interaction, with only minimal sacrifice of academic learning time.

Finally, teachers can begin to take advantage of the many classroom opportunities for incidentally teaching students how to solve problems while interacting socially. For example, if identified before either party becomes too angry, real student disputes can provide an opportunity for students to attempt to explore their own and others' feelings and to think about solutions.

Predatory Violence

Predatory violence is the most frequently studied type. It is perpetrated intentionally as part of a pattern of criminal or antisocial behavior, and it generally results in some personal gain. Gang assaults, robberies, thefts, and muggings are common forms. At school, bullying is one of the more problematic forms of predatory violence and includes intimidation, coercion, and threats to safety and wellbeing. It is more typically carried out by a hostile peer group. Fear of being bullied is frequently reported as the most pervasive outcome of school violence. An estimated one-fourth of all students experience bullying, and over 160,000 students miss school each day because they fear it. Evidence suggests that bullying is intergenerational—that the bully at school is the victim of bullying at home.

There appear to be two distinct pathways to the development of predatory violence in children and youth. The most serious and prevalent pathway involves students who display a general, stable pattern of serious chronic antisocial behavior from an early age. These students are often the most violent, and the pattern is likely to persist into adulthood.

The second pathway involves a larger percentage of youth who engage in violent behavior for a limited time. While as many as 20 percent of adolescents have reported participating in predatory violence, only a small percentage (5–8 percent of males and 3–6 percent of females) are responsible for the vast majority of it.

Prevention and Treatment

Since the most serious form of predatory violence appears to develop slowly and to depend upon the interaction of multiple individual and societal risk factors, intensive and early prevention and treatment methods are advised. Family interventions have repeatedly been shown to be both effective and efficient. Schools may wish to network with community social service providers, which can offer needed support to families in dealing with external stress (for example, poverty or illness). Training focused on decreasing negative parenting and coercive styles of interaction can also be provided by school-based parenting classes.

Schools have implemented peer-group intervention programs designed to alter peer-group norms, prevent increased association with antisocial peer groups, and redirect peer-group behavior. Research strongly suggests that groups (even therapy groups) consisting of only high-risk students actually increase aggression and violence. Apparently, at-risk students reinforce each other's normative beliefs about aggression. Therefore, it is important to mix aggressive and nonaggressive students.

Developing schoolwide discipline programs that move away from a punitive approach should be considered. The most effective programs take care to establish consequences that (1) minimize student resistance; (2) minimize the risk to, or promote the relationship between, the teacher and the child; and (3) provide instruction and/or practice in a socially acceptable alternative to the undesired behavior.

A significant portion of school violence can be related to students' responses to the attempts at punishing them for disruptive behavior. Recently, a number of schools have adopted instructional consequences for some forms of school violence. For example, when students fight, the consequence may include their being placed in an appropriate anger-management program. Thus, students are assigned a consequence that provides instruction and opportunities to practice desired behaviors with adult feedback. The money saved (Average Daily Attendance Funds) by keeping students in school rather than suspending them more than paid for the program in one Illinois school district. Peer-mediation programs are also promising as a way of addressing antisocial behavior in an instructional fashion.

Psychopathological Violence

Psychopathological violence is the fourth and rarest type, yet often the most serious. Less than one-half of one percent of the population is thought to participate in it. Severe psychological trauma and neural dysfunction resulting in individual pathology are suggested underlying causes.

Fortunately, psychopathological violence is rare at school; yet it generates a great deal of media coverage when it occurs. This appears to contribute to students' fears of violence and a general belief that the world is a hostile place that puts them in constant danger. Media presentations of bizarre psychopathological violence both as part of their news coverage and as "entertainment" (for example, films and television programming) have been reported to be far more damaging to children than any real risk of falling victim to an actual crime of this nature.

Younger children often believe that television portrayals of violence are realistic. They may identify closely with television actors and therefore copy their aggressive behavior. Some researchers suggest that this adds to an increased belief in and subsequent development of a "mean society." The average child views three murders on television each night.

Prevention and Treatment

Research on effectively treating children and youth displaying psychopathological violence is rare. Generally, students with behavioral and emotional disturbances of this nature are deemed to require special education services. They often go to alternative schools, residential treatment centers, and/or correctional facilities. Intensive community-based programs have been successful with younger children, particularly when family and cognitive-behavioral intervention components are included. Recently, psychopharmacological treatment of aggressive and antisocial youth has been attempted with some success.

Interventions designed to assist children (and families) to practice critical television-viewing skills have proven helpful. Viewing of prosocial behavior on television, coupled with role play, has also succeeded in reducing aggressive play in younger children.

Conclusion

The four types of violence seem to differ in stability, prevalence, causes, harm, and appropriate interventions. National attention often has focused only on the more serious types—serious predatory and psychopathological. Violent acts that result in physical injury promote a climate of fear and anxiety, and students who have been injured or fear being injured suffer psychological stress that can interfere with their healthy social and academic development.

However, focusing only on the most serious types of violence means concentrating on the tip of the iceberg. It may leave educators paralyzed in their efforts to address school violence. Situational and relationship violence are the most pervasive forms, and they affect the greatest number of people, especially in our schools. The psychological harm and anxiety resulting from bullying, harassment, and threats, which can inhibit students' developmental potential, must be addressed. Armed with a better understanding of violence in all its variations, teachers and school officials can identify reasonable intervention targets. Ultimately, educators need to develop schoolwide programs that increase motivation to perform in school and to hold more prosocial roles within schools and communities.

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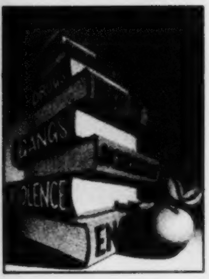

Law, Violence, and School Cultures

Support for the integration of student and teacher cultures as a means to deter youthful violence

Thomas A. Regulus

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Conflict, crime, and violence are problems in many schools. Associated with the increasing racial and ethnic cultural diversity of students, these problems have been linked to the emergence of youth gangs and other intensely competitive student groups (Regulus and Leonaitis 41–42; Knox et al., 33–45). Schools that have had little previous history with these problems are fearful about the potential of student violence. In this article, I discuss the development of adolescent peer groups, student cultures and violence, and effective interventions in deterring student violence that involve integrating school and student cultures.

Adolescent Peer Groups

Adolescence is a time of transition from childhood dependence to young adult independence, when children develop their adult identities through an intensification of peer relationships and a change in their relationships with adults. Adolescents test, promote, and defend their developing identities and independence through both cooperative and competitive forms of peer relationships.

Peer groups are formed based on similarities and differences in values and behaviors and on purely circumstantial, personal, and social factors such as race, ethnicity, neighborhood, social class, school activities, and status: Who lives where? Who is dating whom? Who is smart? Who is athletic? Who has a car? The extent to which adolescents cooperate or compete shapes the types of peer groups—gang or nongang—that develop. The greater the competition among peer groups, the more crystallized they become as they distinguish themselves from one another, so that the distinctions among the groups become the dividing lines of their competition and conflict.

Culture and Peer-Group Violence

Peer groups transmit culture. A culture is a set of values, goals, and behaviors shared by members of a group, school, or community (Regulus and Leonaitis 41). It provides direction about what members of the group should strive for, how they might go about being successful, and how they are to interpret their own and others' behaviors. People sharing a culture are more able to influence one another's behavior than otherwise. Behaviors are influenced by culture in this way.

All adolescents share a common culture—the collective expression of their developing independence and adult identities (Gecas 186). Obvious representations of this culture are hair styles, language, music, clothing, and experimentation with risk-taking behaviors.

Student peer groups create unique versions of this culture. Conflict, crime, and violence can become embedded as normal and valued behaviors in these groups, especially in schools where youth interaction is shaped by intense competition and youths are isolated from adults.

There are several ways that violence is introduced into youth cultures. When violence is used or threatened against a group of youths, their identities are threatened and they feel vulnerable. They may attempt to avoid the violence or decide to submit to violent intimidation, but they also may retaliate in kind.

Violence is often introduced into student groups when youth and youth groups who are already using it teach violence to others and instigate its use in conflict situations. The likelihood of violence increases when nonviolent means for students to gain status or defend themselves, such as mediation boards and peer counseling, are either unavailable or ineffective. It increases when adolescents are unfamiliar with the available, effective nonviolent conflict-resolution strategies and resources. It also happens when schools have no way of binding students to the outcome of mediation when they are not in school.

Law and Culture

For adolescents, defense of sexuality, identity, and status are emotional issues that frequently override considerations of being caught in and punished for prohibited acts. Yet, schools must somehow teach young people the importance of law-based behavior, and encourage the application of these skills to everyday life.

Law-related education (LRE) and similar curriculums emphasize interactive teaching/learning of principles

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Thomas A. Regulus is an associate professor in the Department of Criminal Justice at Loyola University of Chicago.

of law, legal conflict resolution, and violence avoidance. While Spiro and DeJong's research shows promise for curricular interventions such as these in changing values and developing skills in law and conflict resolution, it is unclear whether students take these lessons into their everyday interactions with peers. I would argue, however, that they do when the principles and skills are actually incorporated into their cultures.

Youth (and adults) are more likely to be deterred from conflictual and violent behaviors when teachings about government, law, school rules, and nonviolent conflict resolution have social relevance for them. As Anderson et al. show, having important relationships with others who value nonviolent strategies of achieving goals is a far more valuable strategy for reducing violent student behavior than is the imposition of laws. This is the power of culture—the power of having strong ties to others.

Influencing student cultures and deterring youth from violence are critically dependent on two things. First, a school staff culture must exist that emphasizes nonviolent means of conflict resolution. Then the staff culture must be integrated with the student culture so as to provide an alternative set of positive relationships that sensitize students to nonviolent values and behaviors—relationships that influence, persuade, and pressure students to interact with one another using more adultlike conduct standards in real peer-conflict situations.

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aching Strategy

Safe-Schools Survey

Barbara Miller

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Background

Gathering and analyzing data about the nature and scope of violence is an important step in designing meaningful safe-schools projects. Schools such as North Middle School, a Stanford University accelerated school in Aurora, Colorado, have found that a simple survey can result in significant improvements in how youth and adults interact within a school building.

For example, at North, students reported that they felt safest in their classes and less safe in the hallways, and even less safe off the perimeters of the school grounds. Based on the findings, students, parents, and teachers worked together to change some of the rules regarding the halls. Now classes are dismissed gradually to limit crowding in the halls, and some halls have new "one-way" traffic to reduce shoving.

The Student Handout for this strategy provides some sample questions that students can use to start thinking about what information would help them make their school safer. The questions are taken from a very extensive survey developed by Jennifer Bloom, the director of the Minnesota Center for Community Legal Education in St. Paul, Minnesota, and the Minnesota attorney general's office.

Objectives

As a result of this lesson, students will

- Test hypotheses regarding student experiences related to violence at school
- Develop skills in creating and analyzing survey questions and in analyzing survey results
- Communicate to audiences beyond the classroom information about how youth experience violence

Target Group: Secondary students
Time Needed: Part of two class periods
Materials Needed: Student Handout

Procedures

1. Ask students to make some hypotheses regarding violence at their school. Where do they think violence is most likely to occur? Why do students commit acts of violence? Are students satisfied with the school's current effort to keep itself safe? Advise students to keep a record of their hypotheses for later use in this activity.
2. Solicit student help in designing a survey that will answer questions that interest them. Provide some guidelines for developing and administering a reliable and valid survey. Considerations include (1) administrative approval, (2) ensuring a representative sample, (3) including sufficient numbers of respondents to make accurate generalizations, and (4) calculating the amount of time that will be available for administering the survey.
3. Discuss how the survey results will be used. Will students be writing letters with recommendations to policymakers such as the student council, the principal, or a member of the school board? Will students use the results to design service-learning programs? Will the survey be used to write a school newspaper article? Develop a cover letter to inform survey respondents about how the information will be used.
4. Provide students with the Student Handout and analyze the sample questions: Are the questions understandable? Important? What questions that students want to ask are missing? What demographic information would be helpful (gender, grade level, other)?
5. Provide students with an opportunity to develop additional questions. A student committee can review the questions and build the survey. With administrative approval and perhaps some consultation with a counselor or teacher with evaluation expertise, the survey can be administered, tallied, and summarized. Much of this work can be completed as homework or as an independent project.
6. Once the results are summarized, analyze them. Were the hypotheses supported? What are the usefulness and limitations of the collected data?
7. Consider sharing the information with an audience beyond the classroom. Include students in identifying such an audience.

Barbara Miller is a senior staff associate with the Social Science Education Consortium, Inc., in Boulder, Colorado.

Student Handout

Sample Student Survey Questions

Adapted from the Minnesota Attorney General's Office Safe Schools Survey, St. Paul, Minn., 1994.

Directions: Analyze these survey questions by asking these questions: Are they understandable? Are they important? What questions that students may want to ask are missing? Develop your own school survey.

1. Is your school location considered

   ____ Urban ____ Suburban ____ Rural?

2. Is your school ____ Public ____ Private?

3. What grades are in your school? ____ through ____

4. What grade are you in? ____

5. Are you a male or a female? ____ Male ____ Female

6. In your opinion, during the past year, has the level of physical and/or verbal violence in your school ____ Increased ____ Decreased ____ Stayed the same?

7. During the past year, how often did you personally see violence in and/or around your school?

   ____ Never ____ 5–10 times ____ More than 20 times

   ____ 1–5 times ____ 10–20 times

8. About how often do students talk about violence in and around your school?

   ____ Once a week ____ Once a month

   ____ More than once a week ____ Twice a month

9. How safe do you feel when you are at school?

   ____ Very safe ____ Not very safe

   ____ Somewhat safe ____ Not at all safe

10. In the past year, have any of the following things happened in your school building or on your school grounds?

Has a student	Yes	No
a. Verbally insulted you	____	____
b. Verbally threatened you	____	____
c. Pushed, shoved, or grabbed you	____	____
d. Kicked, bitten, or hit you	____	____
e. Threatened you with a knife or a gun	____	____
f. Used a knife or fired a gun at you	____	____
g. Stolen something from you	____	____

If any of the things in item 10 happened to you, did you report them to school officials or the police?

____ Yes ____ No

If you did not report them, why not?

____ Did not want to bother.

____ Did not think it would make a difference.

____ Did not know whom to tell.

____ Scared of retaliation.

____ Other ______________________________

11. Based on your experience, do you feel that these types of violence are a major problem, a minor problem, or not a problem at your school?

	Major Problem	Minor Problem	Not a Problem	Not Sure
a. Verbal insults	____	____	____	____
b. Threats to students	____	____	____	____
c. Threats to teachers	____	____	____	____
d. Pushing, shoving, and/or grabbing	____	____	____	____
e. Kicking, biting, and/or hitting	____	____	____	____
f. Threatening someone with a knife or gun	____	____	____	____
g. Using knives or firing guns	____	____	____	____
h. Stealing	____	____	____	____
i. Gang harassment or intimidation	____	____	____	____
j. Gang-related fighting or violence	____	____	____	____
k. Other ______________________________				

12. Based on your experience, do you think each of the following is a major factor, a minor factor, or not a factor contributing to the violence in your school?

	Major Factor	Minor Factor	Not a Factor	Not Sure
a. Racial or ethnic diversity	____	____	____	____
b. Various achievement levels among students	____	____	____	____
c. Boredom or lack of motivation to learn	____	____	____	____
d. Poverty	____	____	____	____
e. Gang or group membership	____	____	____	____
f. Involvement with drugs or alcohol	____	____	____	____

(continued on page 14)

	Major Factor	Minor Factor	Not a Factor	Not Sure
g. Lack of parental supervision at home	___	___	___	___
h. Exposure to violence in the mass media	___	___	___	___
i. Overcrowding or lack of supervision in school	___	___	___	___

j. Other ______________________________

13. Please rank the safety of the following places from 1 to 10 (1 being the place in which you feel the most safe, and 10 being the place in which you feel the least safe).

___ In school

___ On the school bus

___ At home

___ At church

___ In your neighborhood

___ At a friend's home

___ At a relative's home

___ At a community center

___ At the local mall

___ In another place ______________________

14. In your school, how often do you think students commit acts of violence because

	Very Often	Some-times	Rarely	Never	Not Sure
a. Other students are carrying weapons.	___	___	___	___	___
b. It makes them feel important.	___	___	___	___	___
c. It impresses their friends.	___	___	___	___	___
d. They are provoked by others.	___	___	___	___	___
e. They want to hurt someone.	___	___	___	___	___
f. They want another person's possessions.	___	___	___	___	___
g. They are prejudiced toward or hate a group of students.	___	___	___	___	___
h. They use or sell drugs.	___	___	___	___	___
i. They are jealous over a girl/boyfriend.	___	___	___	___	___
j. They have to in order to belong to a gang or group.	___	___	___	___	___
k. They are afraid.	___	___	___	___	___

l. Other ______________________________

DRUGS
GANGS
VIOLENCE
EN

Sexual Coercion on Dates: It's Not Just Rape

Research data on sexual coercion and techniques for avoiding sexual victimization

Lisa Waldner-Haugrud

Update on Law-Related Education, 19.2, 1995, pp. 15–18. © 1995 American Bar Association.

Susan and John have dated for several months and have talked about getting married. They have not had sexual intercourse because Susan thinks they should wait until marriage. Following a party at John's apartment, they begin kissing and touching each other. After John tells Sue he wants to have intercourse, she asks him to stop. John becomes angry with Susan and, instead of allowing her to leave, holds her down and has sexual intercourse with her.

Todd goes to a party at a friend's house, where he meets Jan. Todd drinks too much, so Jan helps him into the bedroom to lie down. Jan begins kissing and touching Todd. He tells her to stop because he is feeling sick and is not attracted to her. Instead, Jan unzips Todd's pants.

These situations differ according to the gender of the person initiating sex and the method used to sexually coerce the dating partner. In the first situation, a male uses physical force to coerce an unwilling female. In the second, a female coerces a reluctant male who is intoxicated and cannot give consent to having sex.

Sexual coercion occurs whenever someone pressures a date to participate in a sexual behavior that the date would, under other circumstances, not do. It includes all sexual behaviors ranging from kissing to intercourse, and a variety of methods ranging from verbal pressure to physical force. Physically forcing someone to have sexual intercourse, or *rape*, is the most severe example of sexual coercion. Unfortunately, even intimate relationships are not all free of physical violence or sexual coercion.

Dating sexual coercion falls under the umbrella of school-related violence because high school and college campuses encourage students to date by providing opportunities—such as school-sponsored dances and clubs—for students to meet and interact with potential partners, who may become victims.

Acquaintance and Date Rape

According to the U.S. Department of Justice, one in every twelve women will be the victim of a rape or attempted rape in her lifetime. *Acquaintance rape* is forced intercourse between two people who know each other. Kulp estimates that 60–80 percent of rapes are acquaintance rapes.

Date rape is a kind of acquaintance rape. It means using physical force to have sexual intercourse with a date. Dating situations provide a prime opportunity for sexual coercion to occur, since witnesses are uncommon and help is usually unavailable. Koss et al. suggest that two-thirds of those assaulted in completed rapes have been victimized by dates.

Research by Koss et al. using a national sample of college women reports the following sexual coercion incidence rates since the age of 14. The estimates include dating as well as nondating situations, intercourse and other types of sexual behavior, and a variety of coercive techniques, including physical force:

- 53.7 percent of respondents reported some form of sexual victimization.
- 44 percent reported giving in to sex play (kissing, fondling, or petting, but not intercourse) because of a man's "continual arguments and pressure."
- 25 percent reported having sexual intercourse because they were pressured by their male dates.
- 24 percent reported the use of force that would meet a legal definition of rape or attempted rape (the definition used was that of Ohio).

While tactics such as continual pressure and arguments do not constitute a legal definition of rape, the use of any type of coercion is problematic since the victim would not have consented without pressure from the dating partner. Other studies reveal similar findings. For example, in Reilly et al., 47.3 percent of women on one college campus have had sexual experiences since the age of 14 that can be labeled as coercive.

Reviewing other statistics, Koss argues that nonstudents coming from families with lower incomes are probably *more likely* to be victimized than those with a college education—that women in high school or those with only a high school diploma or less

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Lisa Waldner-Haugrud is an assistant professor of sociology at the University of Houston-Downtown.

education are at higher risk. In fact, Koss cites government statistics showing that the highest risk group for rape encompasses the high school years (ages 16–19). More research data need to be collected before the victimization experiences of students and nonstudents can be compared by age group.

Sexual Coercion Continuum

Current research on premarital sexual coercion describes a continuum with rape at one extreme and other forms (e.g., kissing obtained through verbal coercion) at the other. Using the continuum to describe sexual coercion occurring on dates expands the investigation beyond rape in fundamental ways because it demonstrates that dating partners can be sexually coercive without committing rape. The continuum suggests that those concerned should focus on other dating behaviors, such as kissing and fondling, in addition to sexual intercourse, and on a variety of coercive techniques, including verbal coercion, persistent physical attempts, and intoxication.

Verbal coercion is a broad category that includes a variety of behaviors such as telling lies ("I really love you"), making false promises ("We'll get engaged"), threatening to disclose negative information ("I'll tell—if you don't do this for me"), and making someone feel guilty ("If you really loved me" or "You owe me"). Verbal coercion may also involve name-calling and other put-downs to cajole the partner into complying.

Persistent physical attempts fit a traditional dating situation in which a male tries to kiss or fondle his date or to have intercourse, and the female pushes him away to avoid his advances. The male persists until she "gives in" to his demands. This is an example of how the boundaries between acceptable initiation behavior by males and coercion are blurred because men are expected to attempt kissing and other sexual behaviors.

Studies examining the use of persistent physical attempts, such as Koss et al. and Struckman-Johnson, fail to clarify whether "giving in" means a reluctant partner was persuaded to kiss, fondle, or have intercourse but now regrets what happened, or that she felt there was no choice but to comply. While being persistent without using force is not rape, it represents a more aggressive approach by failing to take "no" for an answer.

Deliberate or induced *intoxication* occurs when someone spikes a drink or encourages a date to get drunk and then takes sexual advantage. Finding someone intoxicated and subsequently taking advantage also falls into this category. Copenhaver and Grauerholz have shown that the use of alcohol and illegal drugs is strongly related to being both a victim or perpetrator of sexual coercion. Koss and Dinero found that alcohol use increases the risk of sexual coercion for women. In some states, such as Ohio, deliberately administering alcohol or drugs and then engaging in intercourse fits a legal definition of rape. At issue here is the fact that consent cannot be given by someone impaired by the effects of alcohol or drugs.

Physical force is a more traditional method of sexual coercion that usually consists of slapping or hitting someone into submission, using a weapon, or holding a victim down. Restraint—blocking a car door and refusing to let a date leave until a sexual behavior occurs—may be considered a milder instance of physical coercion.

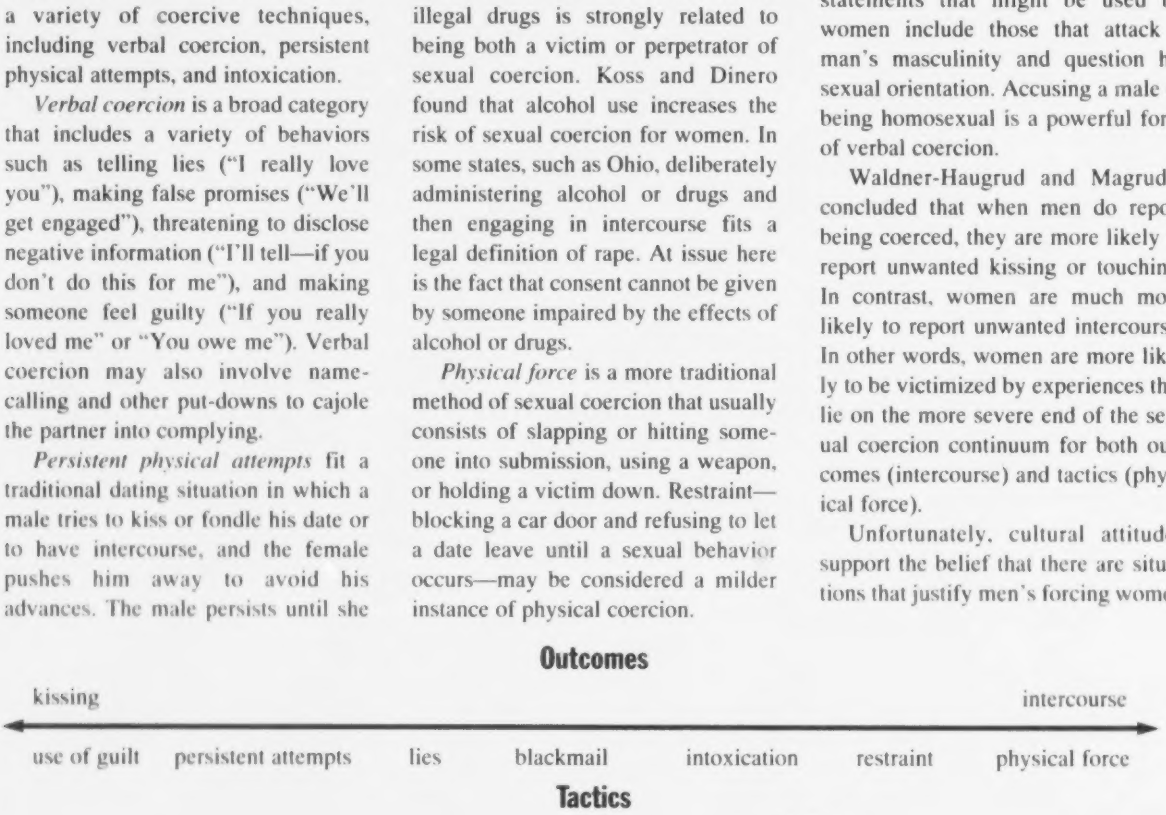
Coercion Victims

These forms of coercion have been studied in both heterosexual and same-sex dating situations. Men have also been asked about their experiences as sexual coercion victims. Incidence estimates of male victimization vary from 7 percent (McKinney) to 44 percent (Poppen and Segal). Rate differences exist because researchers have not agreed on a standard definition of coercion. Poppen and Segal included definitions of more coercive methods in their study than McKinney, perhaps accounting for the higher rates.

When comparing male and female victimization rates, there are several important differences. First, women are sexually coerced more often than men. Struckman-Johnson found this is especially true if physical force was used. Techniques that are more commonly used against men include intoxication and psychological pressure (such as verbal coercion). Specific statements that might be used by women include those that attack a man's masculinity and question his sexual orientation. Accusing a male of being homosexual is a powerful form of verbal coercion.

Waldner-Haugrud and Magruder concluded that when men do report being coerced, they are more likely to report unwanted kissing or touching. In contrast, women are much more likely to report unwanted intercourse. In other words, women are more likely to be victimized by experiences that lie on the more severe end of the sexual coercion continuum for both outcomes (intercourse) and tactics (physical force).

Unfortunately, cultural attitudes support the belief that there are situations that justify men's forcing women



into intercourse. Banks's research with 1,700 sixth through ninth graders found that many youth believe forcing women to have sex is acceptable. For example, 24 percent of boys believed spending a large amount of money (defined as $10–15) justifies force. Sixty-five percent believed long-term dating (6–12 months) justifies force, while 70 percent believed prior sexual contact does. Seventy-four percent of the boys believed force is justified if the couple is planning marriage, while 87 percent found it acceptable if a couple is married. (Recall that the first date-rape scenario in this paper involved a couple discussing marriage.) The proportion of girls approving of force ranges from 79 percent (married couple) to 16 percent (spent a lot of money). Forty-seven percent of the girls believed force is justified if they dated a long time, while 54 percent agreed that prior sexual contact makes force acceptable. Sixty-seven percent approved of force if the couple is planning marriage.

Cultural values that support male-initiated sexual coercion may also support male victimization, as males believing that masculinity is demonstrated through sexual activity may be at higher risk of female-initiated sexual coercion. For example, Margolin's studies of college student attitudes found that men are judged more harshly than women for refusing a kiss initiated by a female dating partner.

In Smith, Pine, and Hawley, many students believed that female-initiated acts of coercion are not really coercion at all since males "are more likely to have encouraged it or initiated the episode, to have derived more pleasure from it, and to have experienced less stress" (110). These beliefs reflect a traditional masculine role that expects males to engage in sexual behavior whenever possible.

The research shows that same-sex relationships are similar to heterosexual dating in that they have many of the same problems, including sexual coercion. In fact, Duncan suggests that gays and lesbians have a higher risk of victimization than heterosexuals (perhaps because gays and lesbians have higher reporting rates). Since the partner's sexual orientation is unclear in this research, the data do not necessarily eliminate victimization by a partner of the opposite sex. It could have occurred with a heterosexual partner prior to the onset of same-sex dating. Therefore, we cannot compare victimization rates of gays and lesbians to heterosexuals at this time. Since sexual coercion can occur anytime in any relationship, understanding the boundary between coercive and noncoercive dating behavior, as illustrated by the coercion continuum, is the key to reducing sexual coercion in this as well as the heterosexual group.

Prevention Techniques

These techniques will not eliminate the possibility and occurrence of sexual coercion because only those responsible—the initiators—can end them. However, there are several ways to reduce risk.

- **Avoid alcohol and illegal drugs.** The use of alcohol and illegal drugs is strongly related to being both a victim and a perpetrator of sexual coercion. According to the Struckman-Johnson research, both males and females reported their dates sexually coerced them through deliberate intoxication. While it is best not to drink at all, moderate consumption is preferable to intoxication. Not only does drinking cloud judgment, it also affects physical coordination, which is important when a person is trying to leave a coercive situation.

- **Date in groups.** One reason date rape is reported less often is that witnesses are uncommon. Reducing dependency on a date reduces the risk of sexual coercion. For example, dating in groups makes it more difficult for someone to become coercive, and using public transportation or arranging alternative rides makes for less dependence on a date. Having a friend, sibling, or parent available to pick a person up in case a date does not go well is another possible strategy.

- **Reject beliefs about rape or sexual coercion that are untrue.** Knowing the facts about sexual coercion increases awareness, which reduces vulnerability. Contrary to popular belief, men can be sexually coerced; women are capable of sexual coercion; one cannot spot a rapist; most sexual coercion is committed between dating partners, not strangers; and gays and lesbians experience sexual coercion.

- **Reject traditional notions of how men and women should behave.** Males should not feel pressured by a date to kiss, fondle, or have intercourse in trying to meet some vague expectation about how "real" men behave. At the same time, females should not need to reward males by kissing, fondling, or having intercourse because the males have paid for the date or provided transportation; nor do females need to prove their love or femininity. Refusing to kiss or have sex does not mean females are uncaring or abnormal.

- **Know yourself.** Men and women who are comfortable with their sexuality and expectations are less susceptible to coercion because they have no need to prove themselves, either through pressuring dates or responding to coercion. Before a date, decide limits on sexual intimacy.

- **Try to communicate clearly.** While it is often uncomfortable to discuss sexual issues, stating limits ahead of time may reduce the risk of coercion. Whenever a date tries to intimidate or otherwise manipulate a partner into an uncomfortable situation, the partner should say something immediately and avoid giving mixed messages. Looking directly at a date and firmly saying "no" is more likely to be successful than looking downward and speaking in a meek tone of voice.

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Look at These Youth/Community Programs

On page 40, you will read about the Teens, Crime, and Community (TCC) program, which combines community service with crime-prevention education to reduce high teen victimization rates. For more information about this and other youth/community involvement programs, contact the organizations below.

Active Citizenship Today (ACT)
Constitutional Rights Foundation Chicago
407 South Dearborn, Suite 1700
Chicago, IL 60605
(312) 663-9057 FAX (312) 663-4321

Law-Related Education and Service Learning
Institute for Citizen Education in the Law (ICEL)
SU School of Law
950 Broadway Plaza
Tacoma, WA 98402-4470
(206) 591-2215 FAX (206) 325-1877

Teens, Crime, and Community (TCC) Program
National Teens, Crime, and Community Center
711 G Street SE
Washington, DC 20003
(202) 546-6644 FAX (202) 546-6649

***Teens, Crime, and the Community Implementation Guide*, issued by the National Crime Prevention Council and National Institute for Citizen Education in the Law (NICEL), is available at the same address.**

Youth Citizenship Competition
Center for Civic Education
5146 Douglas Fir Road
Calabasas, CA 91302
(800) 350-4223 FAX (818) 591-9330

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Teaching Strategy

Acquaintance Rape: What Is the Law?

Pat Larson and Roxann Ryan

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Background

A 1994 study by the National Victim Center (NVC) found that 683,000 females are raped annually and that more than 25 percent of all rapes occurred when victims were between the ages of 11 and 17, while an additional 24 percent were under 11. While the media usually portray rapists as strangers to the victim, the report also documented that most rape is committed by someone the victim knows. Only 22 percent of the victims said their rapists were strangers.

Given the youth of rape victims, the NVC report recommended that education about rape and other crimes against women should be provided, not only in secondary and higher education, but in grade schools and junior highs, with particular attention given to preteens.

Prevention programs should address the themes of power balance, sex-role stereotypes and media-distorted images of women. This strategy deals with the legal definition of *rape* as a means to dispel the myth that date rape is somehow less culpable than stranger rape.

Objectives

As a result of this lesson, students will
- Distinguish between the fact and the myth of rape
- Identify situations in which the legal definition of *rape* is met

Target Group: Secondary students
Time Needed: Minimum of 2 class periods
Materials Needed: Student Handouts 1–2; copies of your state's rape law
Resource Person: An attorney or judge (for one or two days)

Procedures

1. Before beginning the unit, arrange (a) for the suggested resource materials to be available and (b) for a resource person to speak to the class.
2. DAY 1. Distribute Student Handout 1. Have students complete it individually and then in groups of three. Discuss the answers with them. (Answer key appears below.)
3. DAY 2. Distribute Student Handout 2 along with a copy of your state's rape law. The attorney or judge will discuss your state law with the class.
4. Assign any of these extension activities.
   a. Invite a rape center counselor to talk to the class about how to help a friend who has been raped.
   b. Do further research. Reading suggestions include
      (1) National Institute for Citizen Education in the Law and National Crime Prevention Council. "Acquaintance Rape." In *Teens, Crime and the Community*. St. Paul, Minn.: West Publishing Co., 1992.
      (2) "Rape in America: A Report to the Nation." Atlanta, Ga.: National Victim Center, 1994.
      (3) "When Is It Rape?" *Time* 3 June 1991: 48–55.
      (4) Section on Violence Against Women in the 1994 Crime Bill (available from your congressperson).
   c. For distribution to schoolmates, prepare a brochure on acquaintance rape including phone numbers to use in case of rape.

Answer Key

1. F. Rape is a felony, the most serious category of crime. The law does not distinguish between rape by a stranger and rape by someone the victim knows. No one has the right to force sex on anyone—ever. A rape conviction can result in a long prison term. However, because of biases and lack of understanding by attorneys, judges, and juries, getting the conviction of an acquaintance rapist is often more difficult.

(continued on page 29)

Pat Larson is the educational programs coordinator at the Iowa Center for Law and Civic Education at Drake University in Des Moines. Roxann Ryan is the deputy attorney general in the Iowa attorney general's office in Des Moines.

Student Handout 1

What Do I Know About Acquaintance Rape?

Rape is a flagrant abuse of power that has scarred millions of victims and their families for the rest of their lives. We must all do our part to change society's attitudes toward sexual violence, including understanding more about it.

Directions: Circle T for true and F for false.

T F 1. The law has more severe penalties for rapists who are strangers to their victims than for rapists who know them.

T F 2. Rape by someone the victim knows is more common than rape by a stranger.

T F 3. Acquaintance rape is rare among teenagers.

T F 4. A rape victim suffers less emotional trauma if the rapist is someone the victim knows.

T F 5. Most victims of acquaintance rape do not report it to the police.

T F 6. When females say no, they often mean yes.

T F 7. Females who are raped by an acquaintance have usually invited the rape by dressing or acting seductively.

T F 8. When a couple have been dating for six months or more, it is lawful for one to force sex on the other.

T F 9. If a couple previously had sexual experiences, it is lawful for one to force sex on the other.

T F 10. If someone has spent a considerable amount of money on a date, it is lawful to force sex on the date.

T F 11. A person who is drunk or otherwise drugged during a sexual incident may not claim rape.

Student Handout 2

Legal Definition of *Rape*

Rape laws vary widely among the states. Ask your resource person to define your state law using the following checklist.

- How does your state define *sex act?* ________________________________

  ____

- How does your state define *lack of consent?* Does it include

  ____ force

  ____ victim must show resistance (bruises, broken bones)

  ____ against the will (intimidation or coercion)

  ____ acquiescence to (agreement because of) threats

  ____ incapacitated (drunk, drugged, unconscious, or mentally incompetent)

- How does your state define *statutory rape?* Does it include

  ____ age of victim

  ____ differential of age between victim and perpetrator

  ____ perpetrator in a position of authority over the victim

- What are aggravating factors that affect punishment?

  ____ use of firearm or other dangerous weapon

  ____ more than one perpetrator

  ____ age of victim

  ____ serious injury to victim

- How does your state define *marital rape?* Is it treated the same or differently than other forms of rape? Circle one.

  Same   Differently

aching Strategy

Youth Violence: Its Victims and Impact

Kip Lowe

Update on Law-Related Education, 19.2, 1995, pp. 22–26.
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Objectives

Students successfully completing this lesson will

- Describe how youth are involved in violent crime both as victims and victimizers
- Define *victim of crime*
- List the phases of victimization
- Describe how victims are affected by crime
- List ways to help crime victims

Target Group: Secondary students
Time Needed: 2–3 class periods
Materials Needed:

- Student Handouts 1–3
- Optional: Your state's crime index statistics (from its bureau of justice statistics)

Resource Person: Among other possibilities, a representative from your local victim-assistance (district attorney's) office. See 2. and 6. below.

Procedures

1. Distribute Student Handout 1 and have students read "Teen Violence" and "Teen Victimizers" (pp. 23–24). Facilitate a class discussion focusing on the statistics. Your goal is to educate students to the reality that teenagers and young adults are more likely than other age groups to be both victimizers and victims. Ask students to think of some reasons for these statistics. As an optional activity, obtain your state's crime index statistics, which will contain these statistics for each county in the state. Provide students with information on your local county/community crime patterns.
2. Have students read the next section "Teen Victims" (p. 24). Facilitate a class discussion on who is a crime victim and the phases of victimization. This is an ideal opportunity to bring in a community resource person to assist in the class discussion. A representative from your local victim-assistance (district attorney's) office can be invaluable in helping students learn about victims, the impact of crime on them, and the criminal justice system's response to them. Community resource people can also identify resources for crime victims.
3. Distribute Student Handout 2 "Crimes and Their Impact." Divide the class into groups, and assign one or more crime categories to each group (for example, burglary or domestic violence). Instruct the groups to read and discuss the crimes in the categories assigned and their impact. Have the groups prepare a brief presentation to the entire class on the crimes. A primary goal of this section is to assist students in developing the awareness of the domino effect of crime: how not only the primary victim is affected, but also the victim's family, friends, and the community.
4. Distribute Student Handout 3 and have students read "Victims in the Media." Students must watch a news program or read a newspaper to answer the questions. Facilitate a class discussion about students' responses to the questions.
5. Have students read "Four Major Impact Areas." Students are to identify the impact of crime in four different scenarios. The lists at the top will assist students in this task. Student Handout 2 is also an excellent source.

   This exercise helps to personalize crime by placing the student in a scenario in which he or she is either a primary victim or a friend of a victim. Again, it is important for the class to identify the domino effect of each crime and to discuss how the crime affected the victim and the victim's family, friends, and the community. (NOTE: This exercise often arouses strong emotions in students who have actually experienced a crime. Teachers should be sensitive to these students' needs for referral to counseling services.)
6. To educate students about local community resources:

   a. Have a community resource person provide information on victim services.

   b. Have students research the available services alone or in work groups, looking for rape-crisis hotlines, domestic-violence coalitions, victim-assistance programs, law enforcement resources, and groups such as Mothers Against Drunk Drivers and Parents of Murdered Children. Conclude this strategy by asking students to identify how they can help others who have been victimized by crime.

Kip Lowe is a bureau chief for the California Youth Authority Training Services Division. Nationally, Mr. Lowe provides training and technical assistance in the area of victim services and corrections.

Student Handout 1 Violence: Its Victims and Impact

Teen Violence

America's teenagers are exposed to and participate in violence at an ever-increasing rate. We hear high school students say, "I've seen people assaulted and shot, and I've even seen a dead body . . . it's no big thing." Researchers Kathleen Maguire and Ann Pastore report that 23 percent of the 1993 high school class said that they had been threatened with injury by another person at school during the previous twelve months. Almost 7 percent reported that they had actually been injured by a weapon during that period. As have many adults, American teens have become calloused to violence; it has become an accepted part of day-to-day school life.

Teens claim fear of retaliation and a general feeling of powerlessness when it comes to intervening in school or community violence. They often decide that it's better to ignore the violence than risk emotional or physical harm. It is imperative to ensure the safety of youth. But to successfully involve teens in violence prevention, it is also important to understand and focus on how it becomes OK for teens to participate in and condone violence.

Teens who have experienced violence firsthand at home, in their neighborhoods, or at school may be especially vulnerable to violence. Vulnerable teens may be more likely to react to violence with violence—the victim becomes the victimizer, forming the circle of youth violence.

Teens may mask their own pain or, through exposure to repeated violence, become insensitive and/or unconcerned about their peers' pain and suffering. As a result, the likelihood of teen participation in, or, at the very least, unconscious support of, personal violence increases. Students can be aggressive, exploitative, or destructive to another person or another person's property because they are insensitive to the other's suffering or feelings. Often this insensitivity derives from the students' insensitivity to their own feelings.

According to Alexander Lowen, empathy—the ability to sense other people's moods or feelings—is a function of resonance. We can feel another person's sadness because it makes us sad; we can share another's joy because it evokes good feelings in us. Teens must be sensitized to the impact of violence on its victims, most of whom among their acquaintances are other teens. Only by personalizing crime and putting faces on victims can we hope to uncover and develop feelings of empathy in youth and thereby reduce the epidemic of youth violence.

Teen Victimizers

Teenagers and young adults are becoming more and more involved in violence, both as victims and victimizers. Between 1983–92, arrests of youth under 18 years of age for violent crime increased a shocking 57.1 percent. In 1992, an estimated 83,794 males under 18 were arrested for violent crime, an increase of 4.1 percent over 1991. Also alarming was the increase of female violence. During 1991–92, arrests for violent crime by females under 18 increased by 11.4 percent (U.S. Department of Justice 1993a).

The victimization rates for personal crimes (such as rape, robbery, assault, and personal theft) have declined for most age groups in America. Yet the violent crime rate for young people has increased, resulting in a corresponding increase in the number of victims, most of whom are the same age as their offenders. The National Crime Victimization Survey, 1973–92, found that teenagers and young adults consistently have the highest victimization rates. Youth between the ages of 16 and 19 experienced the highest victimization rate for violent crime, approximately three times that of the general adult population and over ten times that of the elderly (U.S. Department of Justice 1993b).

Recently, violence resulting from the use of firearms, particularly handguns, has increased. Gunshot injuries (homicides, suicides, and accidents) are a major cause of death for children and adolescents in the United States, accounting for 12 percent of all premature deaths. Additionally, for every young person who dies, an estimated five more are seriously injured, according to the Center to Prevent Handgun Violence.

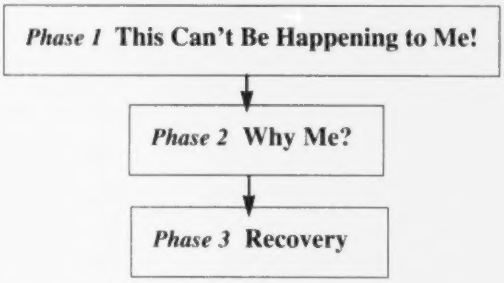
The overall increase in youth violence has had a major impact on our nation's schools. A 1993 study by Lynn Glassman for the National School Boards Association found that of 720 school districts, 82 percent reported an increase in violence in the past five years. U.S. Secretary of Education Richard W. Riley has noted that each year about three million thefts and violent crimes occur on or near school campuses. That is about 16,000 incidents per school day.

Teen Victims

A *crime victim* is a person who is hurt and experiences a loss or injury (psychological, physical, or financial) as a result of someone else's act that constitutes a crime under federal, state, or local law. Generally, victimizing behavior is the use of physical, emotional, or financial force to hurt another or to deprive another of property or rights. Specifically, *violent crime* refers to the criminal behavior that may result in death or bodily injury, including behavior that involves the threat of death or injury. Acts such as homicide, robbery, sexual assault, assault, and dating violence are violent crimes often committed on or near school property.

All victims of crime suffer and generally go through three stages, or phases, of victimization as identified by the Ohio Department of Youth Services. While the progression through phases is common among victims, the intensity and length of each phase may vary.

Phases of Victimization



The first phase, This Can't Be Happening to Me! usually occurs during and/or shortly after a crime has been committed. Common features of this phase include (a) shock; (b) a feeling of time slowing down; and (c) a loss of all ability to function normally. This phase can happen in a few minutes or a few hours.

The second phase, Why Me? is when the victims try to make sense of things and regain control over their lives. Common features include (a) feelings of guilt that they are to blame; (b) a replaying of the victimization in an attempt to cope and rebuild self-image; (c) wide emotional swings, often accompanied by depression, daydreams, and nightmares; and (d) a coming to grips with the fact that bad things happen to good people. This phase may last days, months, years, or a lifetime.

The third phase, Recovery, is the phase when victims work to put their lives back together—when they work to become survivors. Common features of this phase include (a) working to rebuild; (b) learning to trust self and others; (c) learning to overcome chronic anxiety, concentration problems, guilt, sleep disturbances, and isolation, for example; and (d) learning to be around other people. A victim's life is forever changed, and the process of recovery may indeed last a lifetime.

Learning about the impact of crime on victims will help teens be aware of the never-ending trauma that teenage victims of crime endure. Every time a teen is victimized by crime, another teen has been violated and is suffering.

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Student Handout 2

Crimes and Their Impact

Burglary

Physical: ulcers, fatigue, stomach pains/aches, tremors/shaking

Emotional: fear, anger, helplessness, insecurity, loss of privacy, guilt, confusion, depression, vulnerability, powerlessness

Psychological: paranoia about being alone, inability to sleep, depression, nightmares

Financial: out-of-pocket expenses, insurance deductible, loss of wages, court costs, law enforcement costs, loss of irreplaceable items, cost of security measures

Theft

Physical: ulcers, fatigue, stomach pains/aches, tremors/shaking

Emotional: fear, anger, helplessness, insecurity, guilt, confusion, depression, vulnerability, powerlessness

Psychological: inability to sleep, depression, nightmares

Financial: out-of-pocket expenses, insurance deductible, loss of wages, law enforcement costs, court costs, loss of irreplaceable items

Robbery

Physical: loss of life, trauma to body, ulcers, fatigue, stomach pains/aches, tremors/shaking

Emotional: fear, anger, shock, helplessness, insecurity, guilt, confusion, depression, vulnerability, powerlessness

Psychological: paranoia, isolation, intimidation, crying, outbursts, inability to sleep, nightmares

Financial: out-of-pocket expenses, insurance deductible, medical expenses, loss of wages, law enforcement costs, court costs

Homicide

Physical: loss of life, trauma to body

Surviving family members and close friends are victimized and experience many of the emotional, psychological, and financial impacts.

Physical: ulcers, fatigue, stomach pains/aches, tremors/shaking, sympathy pain—experience pain similar to the victim's

Emotional: fear, anger, helplessness, insecurity, guilt, confusion, depression, vulnerability, powerlessness, extreme sense of sorrow

Psychological: unreality, isolation, intimidation, crying, outbursts, inability to sleep, nightmares

Financial: loss of wages, inability to work, funeral costs, care costs for children left behind, law enforcement costs

Domestic Violence/Dating Violence

Physical: trauma to body, ulcers, fatigue, stomach pains/aches, tremors/shaking

Emotional: fear, anger, helplessness, embarrassment, humiliation, insecurity, guilt, confusion, depression, vulnerability, powerlessness, shame

Psychological: paranoia, fear of intimacy, isolation, intimidation, crying, outbursts, inability to sleep, nightmares

Financial: loss of wages, inability to work, medical costs, law enforcement costs, court costs, relocation cost

Drunk Driving

Physical: loss of life, trauma to body, ulcers, fatigue, stomach pains/aches, tremors/shaking

Emotional: fear, anger, helplessness, insecurity, guilt, confusion, depression, vulnerability, powerlessness

Psychological: paranoia, isolation, intimidation, crying, outbursts, inability to sleep, nightmares

Financial: out-of-pocket expenses, medical costs, loss of wages, law enforcement costs, court costs

Sexual Assault

Physical: loss of life, trauma to body, ulcers, fatigue, stomach pains/aches, tremors/shaking, loss of sexual functioning, anxiety

Emotional: fear, anger, helplessness, insecurity, embarrassment, guilt, confusion, depression, vulnerability, powerlessness, shame

Psychological: paranoia of others/of being alone, fear of intimacy, isolation, intimidation, crying, outbursts, inability to sleep, nightmares

Financial: out-of-pocket expenses, medical costs, loss of wages, law enforcement costs, cost of security measures

Neglect

Physical: trauma to body, malnutrition, ulcers, fatigue, stomach pains/aches, tremors/shaking

Emotional: fear, anger, helplessness, isolation, insecurity, sadness, confusion, depression, suicidal feelings, shame, powerlessness

Psychological: crying, outbursts, inability to sleep

Financial: medical costs, foster care costs, court costs

Physical Abuse

Physical: trauma to body, ulcers, fatigue, stomach pains/aches, tremors/shaking

Emotional: fear, anger, helplessness, isolation, insecurity, sadness, confusion, depression, suicidal feelings, shame, powerlessness

Psychological: crying, outbursts, inability to sleep

Financial: medical costs, foster care costs, court costs

Drug Sales

Direct impact on the user and the user's family, friends, community; physical effect on user and user's unborn child if user is pregnant; emotional/psychological impact on society, such as fear and intimidation; financial impact through medical costs, law enforcement costs, court costs

Student Handout 3

Victims in the Media

Instructions: Watch the news on TV or read a newspaper. Choose a crime victim to write about on a separate sheet. Answer the following questions:

1. What is a *crime victim?*
2. Write a description of the crime and the person who was a victim of that crime.
3. What was the impact of the crime on the victim? Remember to think about the impact not only on the victim but on the victim's family, friends, and community as well.

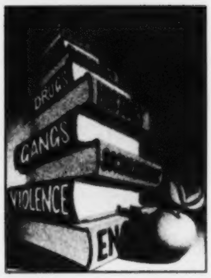
Four Major Impact Areas

Instructions: For each of the following situations, make at least three selections from the impacts lists. Try to select impacts that you feel the victim and/or survivors would experience, and explain each of your selections.

Impacts Lists

Physical	Emotional	Psychological	Financial
Trauma to body Bruises Broken bones Cuts Burns Scars Black eyes Tremors/shaking Fatigue Ulcer Stomach pains/aches Loss of life	Fear Anger Hopelessness Helplessness Isolation Insecurity Sadness Guilt Shame Embarrassment Confusion Depression Suicidal feelings Vulnerability Powerlessness	Paranoia of others or of being alone Social isolation Intimidation by others Crying outbursts Inability to sleep Inability to feel clean and need to bathe or wash many times Depression Wanting to die Nightmares Difficulty having normal sexual relationship	Personal out-of-pocket expenses Loss of wages/ inability to work/loss of job Insurance deductibles Law enforcement costs Prosecution/trial costs Costs of jails, camps, halls, institutions, prisons, and special community programs Medical costs

1. You return to your school locker between classes. It is open, and all its contents are missing. Items taken include your purse/wallet, three school books, a homework folder, a photo album, and a watch given to you by your deceased grandmother.
2. A friend approaches you during lunch and informs you that your girlfriend/boyfriend was severely beaten by her or his father.
3. You learn that one of your classmates was dragged into a closet and sexually assaulted by three male students.
4. While you are eating lunch in the cafeteria with two friends, a fight breaks out between two students across the room. Shots ring out, and you dive to the floor. While lying on the floor, you look over to your friend lying next to you. He has blood flowing from a bullet wound in his forehead, and he is not breathing.



Crime and Corrections, Punishments and Rewards

An argument for the use of positive incentives that reflect democratic values to teach students about the law

Richard L. Roe

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In times when it is popular to "get tough on crime," it is worth reflecting on the purposes and effects of the criminal justice process. Punishment removes offenders from society, and it temporarily deters, or prevents, them from committing more crimes. We assume that the threat of punishment keeps others from violating the law. Yet heavy reliance on the state's authority and power tends to have a damaging effect on those punished and on society as a whole.

This article focuses on the importance of developing a deep public appreciation for and association with the law, and teaching young people the great value in abiding by it. In addition to punishments, positive incentives to abide by the law that are consistent with our democratic values and processes are necessary if we are to achieve more widespread adherence to it. In addressing these issues, the article is supported by recent insights from learning and child-development theories and practices.

Incentives or Disincentives?

"If you can't do the time, don't do the crime," a phrase common among prison inmates, reflects two basic criminal justice principles. When a person disobeys society's rules, he or she may be punished. The criminal justice process is designed to punish lawbreakers: to deprive them of their property, liberty, and even their lives. Also, the threat of punishment may deter potential lawbreakers from committing crimes; they may choose instead to follow society's rules. These principles underscore criminal law's negative, punitive aspects.

Generally, criminal laws are prohibitions. For example, "Anyone who, by force or deception, intentionally deprives another of property valued over $1,000 will be punished by up to ten years imprisonment" codifies, or expresses as law, the idea "don't steal."

The principles of punishment and deterrence have another side, which becomes significant when we understand personal interest's role in abiding by the law. When people feel that their own interests coincide with a law, they are more likely to obey it because they have a positive incentive—a positive reason—to do so. They don't need the threat of a punishment. Other positive incentives for obeying the law include wanting to attain a law's underlying purpose and generally supporting the custom of abiding by the law.

Take the case of a particular motorist who comes to a stop sign at an intersection where there are no police about to enforce the law. Why should the motorist stop? There may be several reasons. First, by stopping, he will advance his own interest in avoiding harm. Second, he will attain the law's purpose: generally to avoid harming other motorists, pedestrians, and himself. Third, the convention of stopping at stop signs is important in itself, since the law works only when all motorists follow it. The motorist encourages others to support the law by his own example, and generally gains personal satisfaction by the customary obedience to society's rules.

In this example, the safety interests of the motorist and society coincide. But what if they don't? By contrast and for a variety of reasons, when personal interests do not coincide with laws, punishments for breaking laws may deter people from doing so. Negative reasons for being law abiding are disincentives. Let's return to our motorist. Not only is the motorist sure that there are no police around, but he is convinced beyond a doubt that running the stop sign would cause no danger to anyone. So why stop? If the motorist perceives his interests narrowly in this way—that he will neither be caught nor harmed, and will gain time by running the stop sign—he may be tempted to break the law. On the other hand, if the motorist sees his interests broadly—that he will benefit in the long term by being law abiding, even if he gives up the short-term benefit of saving time—he will be inclined to obey the law and stop at the stop sign.

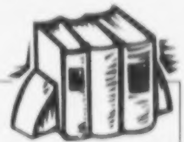
Richard L. Roe is a professor of law at Georgetown University Law Center in Washington, D.C., where he directs the Street Law High Schools and Corrections Clinic and the D.C. Family Literacy Project. He has extensive educational experience in both schools and prisons.

Of course, there is a third influence at work on our motorist. Despite the fact that there is no possibility of being caught, the fear of the consequences of breaking the law, conditioned by the customary need to obey, may in itself keep him from running the stop sign. That is, there does not have to be a police officer behind every stop sign, as long as there is one behind a few stop signs.

Positive or Negative?

The point that people obey the law for both positive and negative reasons raises the issue of what balance society should strike between using positive incentives and disincentives in the rule of law. Consider the problem of tourists feeding deer in a public park. Tourists enjoy feeding the deer. They think feeding helps the animals and brings them close. The deer flock to the tourists and readily take the food. Park rangers, however, have determined that tourist feedings are weakening the animals' ability to fend for themselves and are actually harming the deer by causing disease and other health problems. The rangers have already posted signs saying "Please do not feed the deer," but the tourists ignore them—in part because there is no way to enforce the prohibition.

The rangers now contemplate posting a new sign. There are three approaches. Some rangers advocate a sign saying "Feeding the deer is prohibited. Violators will be fined up to $300." A second group prefers "Please do not feed the deer. People food will make them sick." A third group wants to post both signs. On what basis should they make their decision?



Key Concepts

deterrence a means to discourage someone from acting

incentive something that provokes action, as expecting a reward or fearing a punishment

punishment penalty imposed for a wrongdoing

rehabilitate to restore to useful life through education or therapy

self-interest a person's own interest or advantage

Democratic Values

While law enforcement is our criminal justice system's most obvious activity, also subtly at work is the equally significant application of our democratic ideals. Our government places great value on individual liberty, private property, and collective prosperity. Individuals are free to pursue their own enterprises as long as they do not unlawfully interfere with the common good or the pursuits of others. Liberty is maximized by allowing any conduct that is not prohibited as criminal.

At the same time, an essential component of democratic participation is citizens' capacity for rational deliberation, which includes sound reasoning and logical decision making. To make informed choices, people need intellectual and communication skills as well as freedom. These are fostered largely through a society that is tolerant and respectful of diverse ideas and views and encourages debate. In terms of democratic values, motivation to abide by law that is based on understanding and support of its underlying purposes may be more consistent and desirable than relying on coercion (force) or self-interest to enforce law. In a fundamental sense, the values of openness and choice that are essential to a democratic society contradict criminal law's prescriptive, or rule-making, dimension, which tends to be directive, inculcative, and authoritative—in other words, tends to eliminate choices and demand agreement and obedience.

The notion of due process of law balances the individual's right to privacy against society's need to investigate, bring to trial, and punish crime. Government, the collective agency of the people, is allowed to intervene in a suspect's life with proper justification. Generally, the greater the intervention—which might include the deprivation of rights to privacy, property, liberty, or life—the more justification the government needs. For instance, for police to stop and question a person about a crime, they need a reasonable suspicion. To search or arrest that person, they need probable cause. To imprison that person, they need to prove beyond a reasonable doubt that he or she committed the crime. Again, however, there is an issue of where to strike the balance: Should it be in favor of government interests or on behalf of the individual?

Theoretical Insights

Viewing our criminal justice process as an arena for practicing democratic values, I am inclined toward the proposition that positive incentives to obey rules are preferable to punishments. This idea is supported by recent research, theory, and practice in cognitive psychology, education, and child development, and it applies to how we might handle youth who have become involved in crime and violence.

Both research and experience tend to demonstrate that controlling children's behavior through punishment is unlikely to accomplish the desired long-term goal of fostering their intellectual, emotional, and social growth. Child-development experts and educators in organizations such as the National Association for the Education of Young Children (NAEYC) endorse developmentally appropriate parenting and child-care practices that reject punitive treatment of children. Experts such as child psychologist Bruno Bettelheim and Penelope Leach recommend that adults respond to children's misbehavior with understanding rather than harsh judgments or force. Consistent with the due process notion that fairness in judgment requires a meaningful opportunity to be heard, adults should give serious attention to children's viewpoints and encourage them to express their feelings or concerns in conflict situations. Force is disempowering because, as Bettelheim notes, a child has no power to refuse a parent's orders. On the other hand, children respond positively to parental attention to their needs. In return for this attention, they are more likely to modify their behavior.

Attending to a child's concerns does not mean that the child, rather than the parent, makes the decisions. Rather, the parent considers the child's wishes when making a decision. The connection of developmentally appropriate parenting and child-care practices with democratic values lies in the opportunity for the child to have a voice in the decision-making process, even if the parent holds the veto power.

Simply put, coercive treatment of children tends to result in defiance rather than compliance and propagates the use of coercive problem-solving methods in the child.

The same observation holds for adults, particularly those being punished. Contrary to the uninformed but popular view, prisons are seldom country clubs and are most often human warehouses where arbitrariness, intimidation, coercion, and violence are the norm. It is hard to conceive of how prisoners are expected to become law-abiding citizens upon their release when the vast bulk of prison experience has little connection with positive incentives for adhering to the law. Research shows that prison education programs that involve inmates in problem solving, communication, and understanding and respect for diverse viewpoints can successfully rehabilitate prisoners. Not surprisingly, these factors are consistent with the democratic values discussed above in that participants practice skills consistent with rational deliberation. Yet prison educational programs typically amount to less that 1 percent of prison budgets, and quality programs of the type described account for only a fraction of these.

Conclusion

Both positive incentives and disincentives are ideas inherent in our criminal justice process. While punishment will probably continue to be a major disincentive for lawbreakers, positive incentives should be encouraged to educate people about the law's purpose and to give them a stake in adhering to the law for the greater good and out of principle.

Ultimately, democracy works best when its members act according to their own will and informed choices. By emphasizing the development of democratic values at school and helping students realize that their interests lie with the common good, we can perhaps enhance youthful compliance with the law. Relying on punitive and coercive approaches are suited to authoritative regimes, not democratic societies.

Reference

Bettelheim, Bruno. *A Good Enough Parent: A Book on Child-Rearing.* New York: Vintage, 1988. P. 50. ◆

Acquaintance Rape

(continued from page 19)

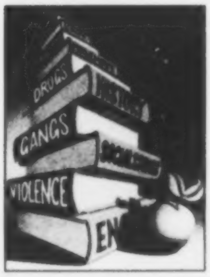
2. T. Almost 80 percent of females are raped by someone they know—a neighbor, a coworker, a classmate, a casual friend, or a close-family friend. Males are also most frequently victimized by someone they know.
3. F. More than 25 percent of rape victims are age 11–17, another 24 percent are under 11, and 84 percent are under 25. Researchers say as many as one in three high school and college relationships includes battering or rape.
4. F. Almost all rape victims feel anger, guilt, fear, and helplessness, and they often mistakenly blame themselves after the attack. At least one-third suffer from posttraumatic stress disorder. Victims of acquaintance rape feel an especially acute sense of shame and embarrassment, since they often feel their judgment was faulty in trusting the individual. They no longer know whom to trust; they are depressed and fearful. Future meaningful relationships will be difficult.
5. T. A major 1994 report by the National Victim Center (NVC) found that far more women are raped annually than previously reported to the FBI: only 16 percent of victims reported rape. One out of every eight adult women has been raped at least once.

(Statements 6 through 11 are all false. They are included because student surveys show that many students believe these myths.)

6. F. When a female says no, she means no. Under the law, anything else is rape. Date rapists often begin with gentle persuasion, then use physical intimidation, and finally force, despite protests.
7. F. Victims do not cause rape. It can happen to anyone, young or old, male or female, no matter how the victim is dressed or how the victim behaves. Most experts say rape is not an act of sexual passion but one of violence used to intimidate and control the victim. Most rapes are planned.

8., 9., 10., 11. F. The legal definition of *rape* in most states does not recognize any excuse for it.

Alcohol is involved in many date rapes, with both parties using poor judgment; but a person who can't give consent because of impaired ability has *not* given consent. Therefore, the state may prosecute for rape.



Weapons: A Deadly Role in the Drama of School Violence

Solutions and strategies for detecting and eliminating weapons at school

June Lane Arnette

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No issue has more forcefully captured the attention of the American public than the increasing presence of weapons on school campuses. More and more young people are willing to risk bringing weapons to school, and they are less reluctant to use them than ever before. The school administrator has frequently become a combat officer in an increasingly volatile environment.

Surprisingly, many of the weapons are not brought to school for the purpose of intimidation or aggression. Students bring them for protection to and from school or simply to show off to their classmates. Unfortunately, impulse often plays a deadly role in the drama of school violence....

"Disarming Our Schools" was the focus of a practicum sponsored by the National School Safety Center in May 1993. Representatives from schools as well as state and federal policymakers assembled in Miami, Florida, to consider prevention and intervention strategies that are showing promise in stemming this national crisis.

Participants agreed that no single approach to the problem of weapons at school would work. They also unanimously concurred that the issues of school violence and weapons on campus are not solely school problems, but ones that must be addressed by communities as well. Many of the participants suggested targeted prevention efforts at earlier ages and improved school climates, along with state and federal school safety legislation as the fundamental components needed for building comprehensive strategies.

Charles Sorrentino, policy advisor for the U.S. Department of the Treasury, compared the borders of the school campus to the borders of our country: In the efforts to keep drugs from coming into the country, interdiction alone has not worked. Similar efforts that focus on weapons and detector devices to stop weapon-carrying students from coming on campus will also not work alone. Sorrentino strongly recommended prevention efforts that address the problem, not merely the symptoms....

Practicum participants recommended that schools and communities take action before crises occur. They suggested that schools identify and assess the extent of the problem in their own communities before developing policies and strategies to confront the presence of weapons and school violence. Every community is unique; community problems of crime and violence require unique solutions.

The process of assessment will help school stakeholders become aware of the need for proactive, comprehensive strategies. Suggested means of assessments include surveys or questionnaires of all school constituents, tracking and analysis of all incidents of school disruption, and perhaps, most importantly, frank and candid discussions with students who can provide the ultimate reality check.

School policies that are developed to deter the carrying of weapons at school must carefully define what is considered a weapon. Guns and knives are often thought of as the weapons of choice. In reality, instruments such as clubs, bats, metal knuckles, slingshots, razor blades, chemicals, explosives, or other deadly, dangerous, or sharp-pointed instruments have been found to be the cause of serious injury or intimidation on school campuses.

Districtwide policies that are both balanced and comprehensive must be written. Practicum participant Dana Schrad, staff attorney for the Virginia State Crime Commission, warned about imposing "correction system approaches, knowing that it is only about 10 percent of the student population that creates 90 percent of the problems." She advocates fair and uniformly applied rules for all students and written policies for determining law enforcement involvement....

One of the most often cited strategies for eliminating weapons on campuses involves students in the reporting process. Gene Haynes, a school administrator from Omaha, Nebraska, said that "students are the best kept secret" in preventing weapons from coming on campus. According to Haynes, administrators must be available to listen to students. When administrators are available and trusted, students will report rumors and tips.

June Lane Arnette is the editor of School Safety Update *at the National School Safety Center in West Lake Village, California.*

Other participants suggested that students must accept some responsibility for their own safety by reporting violence, crime, and weapons on campus. Pittsburgh Public Schools use a "silent" reporting form for receiving anonymous tips. Other school districts such as Detroit and Los Angeles use anonymous, toll-free hot lines. Wesley Mitchell, chief of police of the Los Angeles Unified School District, said this method has been far more effective than metal detectors in recovering weapons in his district.

Participants recommended many curriculum-based or program-based strategies that are working not only for preventing violence in general, but also for eliminating the presence of weapons on campus as well. For example, the STAR (Straight Talk About Risks) program, available from the Center to Prevent Handgun Violence, addresses gun violence prevention. Students learn and practice conflict management and skills for resisting peer pressure. They are given many opportunities for self-reflection and for role play of their typical coping mechanisms.

Peer mediation and counseling for all age groups, conflict resolution training, mentoring programs, multicultural education, and hate curricula and community service programs were additional long-term approaches proposed by the participants for training students to take more responsibility. Gerald Rudoff of the Metro-Dade (Florida) Police Department commented that race relations are at an all-time low and need to be addressed. According to Rudoff, "Myths surrounding various cultures need to be exposed."

Several strategies currently used by districts represented at the practicum involve the elimination of lockers or the restricted use of book bags. By removing lockers and providing students with two sets of textbooks—one for use at school and one for use at home—some schools have eliminated a potential storage place for weapons. In conjunction with this strategy, some schools permit students to carry only mesh or clear book bags so that concealed weapons are more readily visible. Mitchell warned against believing that these kinds of tote bags will eliminate the problem. Students have been known to carve out a hollow space in books to conceal weapons....

Strategies involving the use of metal detectors were addressed with mixed reaction by practicum participants. Several felt that metal detectors were somewhat effective in recovering and deterring weapons on campus but were more effective in promoting awareness of the problem. Some schools in New York that use metal detectors have experienced as much as a 25 percent decrease in student fights, according to former chancellor Joseph Fernandez. Others in the group thought school officials basically admit that they have lost control when metal detectors are employed.

The use of metal detectors does send a strong message to students and the community: The school recognizes the problem of weapons and is serious about solving it. Mitchell commented that in Los Angeles the use of metal detectors has done a great deal for public confidence. He also reports that many students like the use of metal detectors because it demonstrates that adults care about what is happening at school....

James [Bernard James, special counsel for the National School Safety Center] warned the group that generic searches of students using metal detectors may be considered unconstitutional in some jurisdictions. "What makes good law may not make good policy. What works in one jurisdiction may not work in another." The use of metal detectors in schools in reaction to incidents involving weapons at a particular school may be considered lawful and applicable to the court ruling in *New Jersey v. T.L.O.* The use of metal detectors at schools where no incidents have occurred and where no reasonable suspicion exists is dubious. "Rules established in *T.L.O.* are reactive only," commented James. They were not set up to deal with proactive metal detector searches." ...

Teacher training and preparation was a top concern of practicum attendees. James Williams, executive director of the Health Information Network of the National Education Association said, "The student population has changed, and the teachers have simply not been trained to teach in the current environment. They need retraining. They were not trained to be law enforcement officials and feel this is being imposed on them. Teachers were trained to teach."

Participants recommended that all teachers, candidates and veterans included, be trained in crisis intervention, interpersonal skills, classroom management, cultural sensitivity, conflict resolution, crime prevention, legal responsibilities, and risk-factor identification.

Practicum participants recognized the need for smaller class sizes, emergency contingency plans and crisis response teams, communications and alarm systems for classroom teachers, better-trained security supervisors and hall monitors, and more training in classroom management and school law. Many thought that administrators and teachers were poorly informed about what the law permits regarding student management and searches.

The need for improved cooperation, collaboration, and communication between agencies dominated the discussion. Schools no longer can attempt to solve the violence/weapons issue alone. Communities must get involved. Johnson recommended that school administrators go out into the community and share school success stories with local business leaders. In turn, she suggested that schools invite those individuals to visit the school and share their expertise. Programs that involve community volunteers in schools to serve as mentors or campus monitors were also recommended by the group.

Sylvia Garcia, division director of Special Programs of the Texas Education Agency, endorsed interaction among law enforcement, probation, the juvenile courts, and schools. She advocated the need for mandated incident reporting, claiming that there is too much underreporting of crimes at the K–12 levels.

Participants also saw a need for the judicial system to keep its promises. For many reasons, the judicial system does not always enforce laws with prescribed sanctions. Young people will not buy into a system that sometimes acts, at other times does not act, or overreacts. It is difficult for school administrators to apply fair and consistent policies if the larger society is not doing the same.

Participants commented on the lack of mutual understanding on the part of schools and other agencies. Interagency cross-training and programs that bring various groups together in collaborative efforts are needed.

Working together to effect a countrywide zero-tolerance strategy against weapons in school was also recommended. It does little good for schools to suspend weapon-carrying students, turning them over to law enforcement officials or the courts, only to have them return to the classroom in a matter of days. John Wilson, acting administrator of the Office of Juvenile Justice and Delinquency Prevention, stated, "A balanced policy that diverts youth to counseling programs and alternative educational resources until they are ready to return to school offers a more rational and constructive alternative." Mitchell concurred, saying that automatic expulsion for bringing a gun to school offers little help for the student. When students re-enter school, their behaviors are often not changed, but hardened or bitter.

In a countrywide zero-tolerance cooperative system, students who commit a serious crime at school are expelled from the school mainstream and placed in an alternative setting where the schools, law enforcement, the judicial system, and parents are involved.

Arnold Goldstein of Syracuse University's Center for Research on Aggression suggested that the Federal Communications Commission needs to be considered as one of the agencies involved in cooperative efforts to prevent violence. Goldstein commented that television violence and the so-called "Bart Simpson syndrome" are very real influences on youth today. Modzeleski [Bill Modzeleski, director of drug planning, U.S. Department of Education] added that violence in advertising must also be addressed, suggesting that school media literacy programs might be a starting place....

Practicum participants took part in discussion groups. Their recommendations reflect strategies that require little additional resources as well as strategies that entail a greater commitment of resources and funding. ◆

Recommended Prevention Strategies

Short-term strategies requiring few additional resources:

- providing crisis response training
- establishing zero-tolerance of weapons policies
- developing an interagency crisis team
- creating a weapons reporting hotline
- sponsoring a letter-writing campaign to increase student awareness
- involving the community in safe school planning
- offering staff training
- using community volunteers in school for monitoring the campus mentoring and tutoring

Short-term strategies requiring additional resources:

- curriculum changes involving conflict resolution and multicultural education/relations
- use of metal detectors
- security improvements
- outreach programs for parents and students
- district assessments

Long-term strategies oriented toward students:

- teaching students alternatives to violence, including prosocial training, conflict mediation, anger management, peer counseling, and mentoring
- creating awareness programs for students to get them involved in violence prevention
- teaching students the consequences of certain behaviors through health education, media literacy courses, and presentations by victims
- creating self-esteem programs

Long-term strategies for administrators:

- increase visibility and availability on campus
- increase support of teachers
- enforce rules fairly and consistently
- effectively collect and analyze incident data
- increase ethnic awareness and broaden ethnic sensitivity
- learn state laws and local policy
- develop programs that reflect student interests
- develop campus access policies
- coordinate community and/or agency efforts toward violence prevention and safe school planning

Strategies for teachers:

- learn effective classroom management skills
- apply fair and consistent discipline
- create positive teacher and parent collaboration
- increase ethnic awareness and broaden ethnic sensitivity
- be aware of nonverbal messages sent to students

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DRUGS
HISTORY
GANGS
SOCIAL
VIOLENCE
EN

Teen Courts and Violence Prevention

Why teen courts are a successful tool in deterring youthful violence and crime

Deborah Williamson and Paul Knepper

Update on Law-Related Education, 19.2, 1995, pp. 33–35. © 1995 American Bar Association.

Since 1983, when the first teen court appeared in Odessa, Texas, teen courts have sprouted up across the nation. Programs operate in 60 cities and 15 states. According to the American Bar Association, over 150 teen courts are operating nationwide in spring 1995.

Teen court's and LRE's goals overlap significantly. Learning about the law is the feature that overlaps most clearly. Paul Freund wrote that LRE gives young people information about the law but, more importantly, teaches "moral reasoning" and "appreciation of the legal process." In learning about the place of law in a free society, they come to appreciate the law "in a technical, neutral sense." (Starr 42) Essentially, teen court takes LRE a step further by offering young people the opportunity to participate in an actual legal process.

Major Goals

Teen court offers a powerful lesson in civic responsibility and is founded on the idea that the same force that leads youth into law-breaking—peer pressure—can lead them back out of it. The courtroom roles of attorney, clerk, bailiff, and juror are performed by students between the ages of 12 and 17. Only the judge is an adult. The jury does not decide guilt or innocence but gives a constructive sentence that includes jury duty. Defendants reappear in the courtroom to take part as jurors in the sentencing of defendants. "Teen court," in the words of one participant, "allows teens to be citizens."

Rothstein and Rothstein explain that accountability is another goal of teen court. Unlike juvenile court, in which first-time offenders pay a fine and listen to a lecture from an adult, teen court used as a court-diversion program lets defendants experience justice delivered by teen peers. Defendants must acknowledge the wrongfulness of their actions, stand before a jury, receive a sentence, and complete a sentence. Jurors and defendants attend the same schools, live in the same neighborhoods, and enjoy the same social activities. The message defendants receive from the other participants insists that "If we can resist peer pressure and stay out of trouble, you can resist peer pressure and stay out of trouble."

Building self-esteem is another important goal. When defendants become jurors, they are challenged to perform at their highest level of ability. In deliberating with other jurors, they interact with youth who make positive life choices and learn about their own abilities and interests. In fulfilling their community service, they gain the satisfaction of working with positive role models to improve the quality of social life.

Finally, there is the goal of learning about the legal process. Through their experience as defendants and jurors, participants learn about the nation's legal system. Teen court greatly emphasizes educating young people about the place of law and the legal process in society and about the qualities of good citizenship. It presents the courtroom as a place where society's basic values are communicated in very clear and direct terms. As Rothstein and Rothstein show, defendants learn society's rules and the reasons why society needs rules from those who are uniquely qualified to communicate with them—other young people.

Programs

With few exceptions, teen courts across the country follow the basic Odessa model. With the assistance of adult volunteers, a coordinator administers the program for a juvenile court, police department, school district, or probation department. Defendants are referred by juvenile court judges, social workers, police officers, juvenile probation officers, or school administrators. Typical offenses include vandalism, theft, shoplifting, drug or alcohol abuse, fighting, and

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Deborah Williamson is the director of the Law-Related Education Program in the Administrative Office of the Courts in Frankfort, Kentucky. Paul Knepper is an associate professor of political science and justice studies at Northern Kentucky University in Highland Heights.

traffic violations. Sentences include community service hours, workshop attendance, and jury duty. The coordinator recruits jurors, attorneys, and other participants from high schools. After a multiweek training program facilitated by the coordinator with the cooperation of local judges, attorneys, and others, the recruits are sworn in and take an oath of confidentiality.

Kentucky's teen court operates alongside juvenile court within the state's district court. Judges may refer defendants to teen court only after a finding of guilt or a guilty plea. Once the teen court coordinator receives the paperwork, the coordinator meets with the defendant (and his or her parents) and schedules a court date. On the day of the proceedings, the judge reviews appropriate courtroom behavior and reminds the participants of the proceedings' gravity. The bailiff swears in the jurors and shows them to their places in the jury box. The clerk calls the case docket number and the defendant's name. The judge asks the defendant to come forward, seats her or him in the witness chair, and informs the jury of the offense.

The prosecuting attorney and the defense attorney question the defendant. The prosecutor reminds the jury that the defendant's conduct was a violation of the law and requests a stringent, meaningful sentence. The defense attorney highlights performance in school, involvement in church, or other community activities; describes punishment already received from parents; and requests a lenient sentence. The jury then retires to the deliberation room, elects a foreperson, and decides upon a constructive sentence.

When the jury returns to the courtroom, the bailiff carries the decision from the foreperson to the judge. If the sentence is acceptable, the judge calls the defendant forward, says to face the jury, and reads the sentence. The defendant then meets with the coordinator to arrange a community service, counseling, or educational workshop site. The defendant has six months to complete the sentence. If completed, the offense is expunged, or completely removed, from the record. If not, the case returns to the district court.

Kentucky's program began in 1992 as part of the state's LRE initiative. In 1990, Robert F. Stephens, the chief justice of the Kentucky Supreme Court, had organized a twenty-six-member round table to promote LRE in schools, communities, and juvenile justice settings. After investigating model teen courts at Odessa and Globe, Arizona, meetings were organized with judges, attorneys, and community leaders in several Kentucky counties. As Williamson et al. report, today, teen courts operate in northern Kentucky (Kenton, Boone, and Campbell Counties) and in Franklin, Warren, Madison, and Montgomery Counties.

Violence Prevention

The federal Office of Juvenile Justice and Delinquency Prevention has suggested that prevention programs should focus on factors that increase the likelihood of violence and protect youth from influences leading to violence. When combined with teen court, LRE holds the promise of building protection from peer group influences and neighborhood and community influences as well. Teen court can combat individual factors leading to delinquency by teaching moral values and positive character traits. In Franklin County, participants completed five two-hour training sessions prior to their teen court service. The sessions began with an overview of the juvenile court since the 1964 *Gault* decision and ended with a mock trial. Then the actual teen court sessions began. "It is a good idea to get our youth involved in the judicial process. I now understand it better than I ever did before," expressed one participant.

"I really thought it was a good experience which helped me understand our judicial system more," said another. "We learned about it in school, but nothing teaches you better than experience."

Teen court can respond to negative pressures that operate in school settings by building links with teachers. In Franklin County, high school teacher Karen Buzzard taught a semester-long LRE course. She covered essential LRE ideas of authority, justice, and responsibility in her curriculum, and she engaged a variety of local court professionals to interact with her students. When the teen court coordinator began to recruit volunteers, Buzzard's students responded with enthusiasm. Through their involvement, these young people provided a positive interaction for teen court participants who began as defendants.

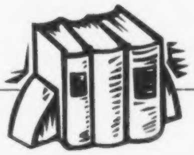
Teen court can provide a means of dealing with peer group influences. This is its most outstanding feature as a protective factor. Participation in teen court offers youth who associate with delinquency-prone groups the opportunity to make contact with those who choose law-abiding behavior. "I am excited about throwing peer pressure in reverse," says Judge Jeffrey Walson, who oversees the Madison County Teen Court. "Possibly we can take peer pressure, modify it, and use it in a positive way. By virtue of student peer pressure, the defendants will listen to authority like they never have before." Recipients of this "reverse peer pressure" agree. One defendant who received sixty hours of community service was hurt that the jury had not trusted him enough to award jury duty. "They just think I'm a bad guy," he sighed.

Note: In the case* In re Gault, *387 U.S. 1, 36 (1967), the Supreme Court ruled that a minor who could be sent to a facility for juvenile delinquents has the right to a lawyer.

Teen court engages the community by using nonprofit agencies as partners. These provide placements for defendants sentenced to do community service (aside from jury duty, the most common sentence). Community involvement is a crucial teen court lesson. One Madison County teen court volunteer put it simply: "Young people need involvement. They cannot know citizenship without involvement." One of Franklin County's first defendants completed his community service and jury duty as assigned, then he asked to participate as an attorney. Others have sought to remain at their community service site after fulfilling their obligation to court.

Conclusion

Teen court is law-related education in action. The program is a powerful LRE medium because its participants put the legal principles they have learned into use. The process requires them to engage in moral reasoning and to appreciate the nation's legal system from the perspective of a participant. One teen court prosecutor explained the difference this kind of participation makes: "I belong to mock trial, and the experience is invaluable. But in mock trial, you memorize everything, and you know what you are going into. Teen court provides a much better experience because it is a real-life situation. It gives the participants responsibility. We come to realize how serious the proceedings are." As an innovative LRE medium operating as part of an overall delinquency-prevention plan, teen court presents a useful strategy for reducing violence among the nation's youth. A creative solution to the multifaceted problem of delinquency, teen court makes use of a resource that is too often overlooked—our young people.



Vocabulary

bailiff the officer who guards jurors and prisoners in court

clerk the official responsible for records and general procedures of a court

court the place where justice is administered; an assembly of persons chosen to administer justice

defendant the person sued or accused in a court, the defending party

juror a member of a jury

jury a group of people sworn to give a decision according to the evidence presented to them in a court

offense the act of breaking a law, a crime

sentence a decision by a judge or court on the punishment of a criminal; the punishment itself

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Teen Courts in School: Teaching Responsibility, Justice, and Authority

John Wheeler

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Objectives

- Introduce students to the school court concept
- Give students practice in a structured decision-making process

Target Group: Secondary students
Time Needed: 2–3 class sessions
Materials Needed: Student Handouts 1–3

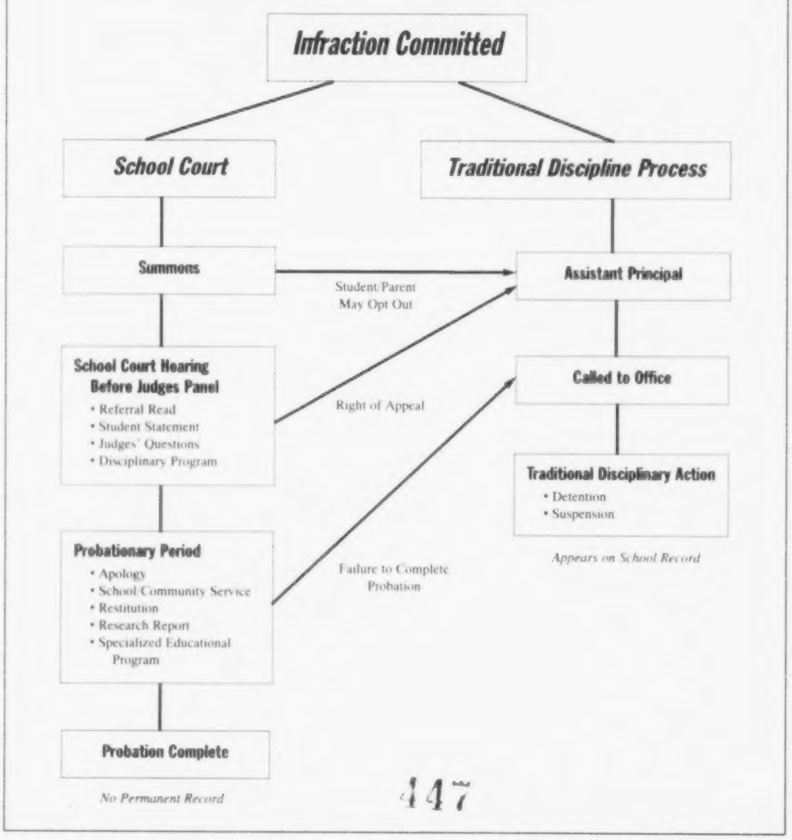
Procedures

1. Have students read Student Handout 1. Help them compare the school court and the traditional system using the diagram on this page. Discuss with them the possible merits or drawbacks of the Hoyt Middle School Court. How would this discipline method work in their school?
2. Distribute Student Handout 2, which contains a school-court decision-making process as well as referral cases. Using any of the hypothetical cases provided, walk students through the process.
3. In small discussion groups, have students continue considering and role-playing the scenarios on Handout 2.
4. Have students read the oath and sign the judge's contract on Student Handout 3. Then encourage them to come up with their own scenarios to use with panels of class members.

Note: Whether used as a precursor for school court development or merely as a general class decision-making activity, this strategy is designed to give students practice with a structured decision-making process. Stress that decisions should be made after reflective thought and based on the best information available, not on gut-level reactions or instincts.

John Wheeler is an educational programs coordinator with the Iowa Center for Law & Civic Education at the Drake University Law School in Des Moines.

Hoyt Middle School Court Referral System


Infraction Committed
School Court
Traditional Discipline Process
Summons
Student/Parent May Opt Out
Assistant Principal
School Court Hearing Before Judges Panel
• Referral Read
• Student Statement
• Judges' Questions
• Disciplinary Program
Right of Appeal
Called to Office
Traditional Disciplinary Action
• Detention
• Suspension
Appears on School Record
Probationary Period
• Apology
• School/Community Service
• Restitution
• Research Report
• Specialized Educational Program
Failure to Complete Probation
Probation Complete
No Permanent Record

Student Handout 1

Hoyt Middle School Court Referral System

Two students push each other in the cafeteria, damaging a table and spilling food that the custodian must clean up.

In most junior high and middle schools, these students would be referred to the assistant principal or dean of students, who might give them a detention or an in-school suspension as a form of punishment. At Hoyt Middle School in Des Moines, Iowa, these students are referred to the Hoyt Middle School Court. There they appear before a panel of their peers, explain their actions, and receive a sentence of creative disciplinary action directly suited to their case and circumstances.

In this school, students have accepted responsibility and taken a leadership role in fostering a sense of school community. Through peer action, order is restored so that valuable learning can take place.

Student-led Discipline

Throughout the nation, individual schools have developed their own student-led disciplinary panels. These range from formal curricular-based court projects complete with attorneys, bailiffs, and clerks, to very informal programs in which panels of students hear cases involving their peers. What all of these have in common is a student-centered disciplinary approach in which the students themselves establish the parameters of acceptable behavior and create a sense of school community.

The Hoyt Middle School Court handles disciplinary cases on a referral basis. Teachers, staff, and student conflict managers may refer to the court students who have violated school regulations, shown disrespect to others, or crossed the bounds of good behavior in other ways. These students have the option to go through the traditional disciplinary process or face the school-court judges panel.

Judges Panel

The Hoyt Middle School Court is open to all students and adult staff members. Each judges panel consists of five students and two teachers chosen from a larger pool of trained students and adults. As part of their agreement to serve on the panel, the judges must participate in a training session designed to familiarize them with the rules and procedures of the court and engage in skill-building activities that develop active questioning and decision-making abilities. As part of this training, participants are exposed to a model decision-making process and a checklist for good decisions, which they are encouraged to use during actual hearings.

For each case, the judges read the referral, ask the student for an opening statement, question the student about his or her actions and state of mind, and then create a disciplinary program specific to the case at hand. Probationary activities may include school or community service, written or oral apologies, restitution, research reports, or specialized education programs.

Of course, some types of cases are inappropriate for student panel review. By school district policy, for example, cases involving serious acts of violence, drug use, and possession of weapons must be handled at the district level. However, the vast majority of student referrals to the office are ripe for school-court review.

Teaching Mechanism

For student judges, the court is a mechanism to teach about core democratic concepts such as justice, authority, responsibility, and respect. Service on the court also provides excellent leadership training. For students referred to the court, the process offers a chance to tell their sides of the story and explain their actions to fellow students, who may understand their motivations. For teachers, staff, and administrators, the school court has meant that they can get back to the serious job of teaching.

Student Handout 2

Important Steps to Making a Good Decision

1. What are the FACTS of the case?
2. What ISSUES are involved? How serious do you consider these to be?
3. What QUESTIONS should be asked in order to gain more information?
4. What are some POSSIBLE SOLUTIONS to the problem?
5. What are the STRENGTHS and WEAKNESSES of each alternative?
6. What will you DECIDE to do to resolve this case?
7. Apply the GOOD DECISION CHECKLIST to make certain that the solution meets important criteria.

Checklist for Good Decision Making

Yes	No	
		1. Is the decision clear/specific enough? Does it tell
___	___	• Who?
___	___	• What?
___	___	• When?
___	___	• Where?
___	___	• How?
___	___	2. Is the decision easy to understand?
___	___	3. Is it possible to follow the decision?
___	___	4. Is the decision related to the offense?
___	___	5. Will the decision resolve the problem?
___	___	6. Does the decision interfere with or violate important rights of the student?
___	___	7. Is the decision fair?
___	___	8. Taken as a whole, does the decision set things right
___	___	• with the victim?
___	___	• with the community?

Case Referrals to School Court

1. A student constantly disrupts class by being out of her seat, sharpening pencils, looking out the window, and "helping" classmates. A private talk between the student and her teacher does not help.
2. During a quiz, a student refuses to remove his books, papers, and notes from his desk. He mouths off and swears at the teacher when she informs him that he will receive a 0 unless he puts his books and papers out of sight.
3. A custodian catches a student writing notes and graffiti on a locker with a permanent marker. The student tells the custodian that cleaning it up is "his job."
4. A coach breaks up a bullying incident in which two older students hassle a younger one in the locker room after practice.
5. The assistant principal investigates a series of petty thefts. She catches a student breaking into lockers and throwing the contents into the hall early in the morning—an hour before the school day begins.

Student Handout 3 School Court Contract

____

(Name of School)

Judge's Oath

I agree to abide by all of the rules and responsibilities of membership on the School Court, to treat this position with the utmost respect, and to carry out my duties with maturity, fairness, sensitivity, and objectivity.

Judicial Contract

As a member of the School Court, I agree to each of the following as a condition of my participation:

____ ***Confidentiality*** I agree to keep confidential the proceedings of the School Court. I will not discuss individual cases or the disposition of cases with anyone except in specified educational settings.

____ ***Time Commitment*** I agree to commit my full time and energies to the position of School Court Judge. I will make myself reasonably available to hear cases and to perform supervisory duties.

____ ***Training Requirement*** I agree to undergo the specified training as a requirement of service on the School Court.

____ ***Infractions*** Any infractions that I commit while in service as a member of the Court will be judged by my peers on the School Court. In addition, the other judges, sitting en banc [in full court], will consider my future membership on the Court.

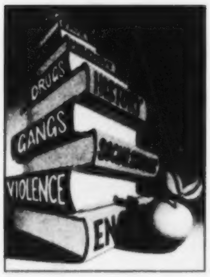
____ ***Conflicts of Interest*** In order to avoid a conflict of interest (or even the appearance of a conflict of interest), I agree to recuse myself from (decline to judge) all cases in which I have a substantial personal interest.

____

(Name)

____

(Date)



Student Action in the Community

How students can fight community crime and violence through service projects

Erin Donovan

Update on Law-Related Education, 19.2, 1995, pp. 40–41. © 1995 American Bar Association.

Today, there is an increasing perception that young people are angry, irredeemable, and responsible for the growing violence problem. Yet, too often, society waits until young people become a problem before helping them. Only when they are teenage parents, juvenile delinquents, or school dropouts, do we reach out for them. The fact is, while the teen violence rate has risen in recent years, teens are also the group most likely to be victimized by crime—at twice the rate of the general population and ten times that of the elderly.

By focusing our public policy and education decisions on the violent crimes young people commit, we ignore two critical pieces of the solution to youth violence. Young people need (1) educational programs that teach them how to be safe and (2) programs that help them find opportunities to apply this life-saving information to their schools and communities. Service learning provides both these understandings, as well as the positive recognition, outlet for energy, meaningful work, and bonds to the community that help young people become responsible citizens.

Eager for a chance to contribute, teens offer an enormous pool of untapped energy, talent, and enthusiasm. The vast majority hope for a better life and seek opportunities to participate in and serve the larger society. They cry out to their families, schools, and communities for recognition and a sense of belonging. When such support is not found, the cry too often takes the form of a deviant act.

By providing teens with service projects that help them become part of the crime-prevention solution, schools and communities create climates that send them a positive message, claiming them as valuable community members. The projects offer them opportunities to develop self-esteem; critical thinking, problem solving, communication, leadership, and citizenship skills; and the confidence that they can play an important role in making their schools and neighborhoods safe. Teenagers with a strong sense of self-esteem who have a stake in their communities are less likely to become involved in prevalent teen crimes such as alcohol and other drug use, including drunk driving; shoplifting; and violent crime such as date rape and assault.

For young people on the fringe, being asked to contribute can become the first step toward positive, healthy engagement with their schools and communities. Adults who may have been quick to blame young people see these students doing something positive and rethinking their attitudes. Having demonstrated their potential to society, they feel more valued, and they become less prone to crime. They have a clearer sense of purpose, and they have formed bonds that help protect them from delinquency. We owe these young people this opportunity. Their lives depend on it.

TCC

From its beginning, the Teens, Crime, and Community (TCC) program, a nationally recognized crime prevention and service-learning program, has combined community service with crime-prevention education to reduce high teen-victimization rates. It is critical for effective citizenship and for fighting crime that young people

Update Index Available

All things considered, it seems the *Update* index will best serve our LRE community at the beginning of SY 95–96, just when lessons are starting. So we have (again) rescheduled the formal publication of the *Update* index for our next issue (Vol. 19, No. 3). Meanwhile, copies with entries through spring 1995 are available. To get one, contact American Bar Association/YEFC, 541 North Fairbanks Court, Chicago, IL 60611-3314, (312) 988-5735, FAX (312) 988-5032 ATTN: Paula Nessel.

Erin Donovan is the director of the National Teens, Crime, and Community (TCC) Program Center, a joint initiative of the National Crime Prevention Council and the National Institute for Citizen Education in the Law.

believe they can control the circumstances of their lives, protect themselves, and better their communities.

The classroom is a natural environment in which to introduce and apply the concept of community service to reduce local crime problems. Whenever problems are daunting, pulling together as a class to solve them as a mutual concern greatly increases students' confidence and their chance for success.

While students nearly always report that they have learned a great deal from the TCC curriculum alone, the service projects reinforce and extend that learning. They help students see the practical value of their instruction and the way it results in meaningful action against crime. And the programs help strengthen contacts with community resource persons and agencies. Those students who have shown an interest in the subject matter addressed by a particular resource person may want to develop that interest further by designing a project that addresses that issue or assists that person's organization, for example.

Successful Methods

The TCC found that there are four important factors that define successful service projects and contribute to their success.

- *Service projects must be teen designed and teen led.* Though students work with adult mentors, for maximum benefit, it is critical for students to be responsible for carrying out their projects. One of the main purposes of service projects is to help teens understand their capacity as resources to prevent crime. Teens who are challenged to make changes and who are given the skills and freedom to plan and carry out service projects are more successful at translating classroom knowledge into effective community action.
- *Service projects must result in real change.* Changes teens can effect in the community are as important as teen attitudes and the connection they feel to their communities. The term *service project* is used for a reason. Its purpose is to spur teens to demonstrate how they can change their environment. The change could be raising the school's or community's awareness of crime and crime-prevention issues, educating through specific crime-prevention messages, or advocating or fund-raising for crime-prevention or victim-assistance programs.
- *Service projects must be completed in one semester.* Projects are most effective and instructive when they can be planned and executed within one semester. This allows students to see projects through to completion and helps ensure that the project ideas and planning process remain manageable for everyone involved. Students are most likely to be eager to act on information they have just learned. (Of course, this does not rule out projects that extend beyond the semester. Motivated students should always be encouraged to continue to pursue community service.)
- *Service projects must be based on local problems.* Since teens need to connect to the community and see the immediate relevance of their classwork, a grounding in the local situation—the needs of the school or neighborhood—is necessary. In addition, no single project or particular crime-prevention strategy fits every situation. Students must assess the local situation and select project topics and approaches that best fit those circumstances. In one community, the issue might be drug abuse; in another, drunk driving; and in yet another, assault or vandalism. Community education efforts, physical improvement projects, cross-age teaching programs, or mediation all might be used to address local needs.

Successful Projects

The TCC experience with crime-prevention service projects has been very positive. Urban, rural, and suburban young people have been highly creative in their approaches. In Hibbing and Chisolm, Minnesota, the TCC program is a partnership between the schools and the regional corrections office. This year, students worked with the local radio station to create public service announcements aimed at preventing community crime. Each week, the students selected a different crime-prevention message from the TCC textbook. For example, after completing the conflict management chapter, they created an announcement that encourages people to think of as many options as possible when faced with a conflict.

In North Charleston, South Carolina, TCC students have been working in partnership with local nurseries and hardware stores on a school beautification project. The program has been so successful that the participants decided to expand with new projects, including cross-age teaching and the creation of a TCC gospel choir. The choir consists of TCC students who visit the local elementary schools. Through their music, they provide crime-prevention messages and speak to students about ways in which the TCC has influenced their lives. Looking to the future, they also encourage the elementary children to attend TCC classes when they get to middle school.

In Boston, TCC students were alarmed by the number of billboards in their community that advertised alcohol. They lobbied to have the billboards removed and other billboards simultaneously purchased that provide crime-prevention and healthful behavior messages for the benefit of the entire community.

Service projects can be as simple as a classroom crime-prevention poster or as ambitious as a neighborhood cleanup. What really matters is the people who do the projects, and the people who benefit—youth and their communities. ◆

Teaching Strategy

Mental Maps: A Tool for Thinking About Community and School Violence

Barbara Miller

Update on Law-Related Education, 19.2, 1995, pp. 42–43. © 1995 American Bar Association.

Background

Mental mapping of school and community violence provides a concrete and vivid representation of youth perspectives on violence. It is based on the premise that a map drawn from memory constitutes a perception of reality even if the map is inaccurate. Freehand maps offer a graphically rich data base for beginning the process of analyzing violence issues that are on students' minds and for developing service-learning projects.

Objectives

As a result of this lesson, students will

- Describe a range of violence issues that impact their school and/or their community
- Compare perspectives on community or school violence
- Select a focus for a specific problem of violence that they wish to address

Target Group: Grades 5–12
Time Needed: 45 minutes, with additional time for projects
Materials Needed: Student Handout, map materials, community street map and/or school floor plan

Procedures

1. Introduce the concept of mental mapping to students. Explain that geographers are interested in the maps that people carry around in their heads because these provide important information about how people perceive their communities. By analyzing maps that people from a community make, geographers offer explanations for how people's perceptions of a place influence their behavior.
2. Pass out the Student Handout. Explain that, as in the handout's first illustration, students will individually sketch mental maps of their community to show the "safe" and "dangerous" places. Emphasize that they should be prepared to give reasons for their choices. Because mental maps are based on our experiences, one person's map may be very different from that of another person living in the same place. Explain that by making and sharing maps, class members will have an opportunity to share their understanding of the safe and dangerous places in their community. (Note: Do not give students a geographical boundary. The mental maps will reveal the size and shape of each student's "community.")
3. Divide the class into work groups of three or five students to compare maps, and then develop a composite map that shows three dangerous places and three safe places, similar to the second map on the handout. Criteria for grouping students may vary.
4. Ask each group to develop a two-minute presentation of its map for the whole class. Each group may "coach" one representative to present its ideas, or it may develop a presentation that involves all of its members. The presentation should include the reasons for selecting the information on the map.
5. In the large group, provide each work group with an opportunity to explore the reasons for their choices of *safe* and *dangerous* places.
6. Ask students to look for relationships among the maps. What do the maps have in common? What makes the maps different? Chart their answers.
7. Post the summary of the discussion. Use the following questions to explore the thinking imbedded in students' presentations: Which problems seem most serious? Do you think increased fear of crime increases victimization? What role do you think youth can fill in addressing this problem? What other information do you need?
8. Assign these individual and small group projects.
   a. Mapping Police Statistics
   Obtain uniform crime or incident reports by location from the police department. Plot the information on a street map using color to code types of crimes. How does this map (a cloropleth) compare with the perceptual maps? Do the crime statistics confirm the information on the perceptual maps?
   b. Conversing with Experts
   Invite city planners and/or law-enforcement officers to analyze the map with students and discuss possible physical changes that might make the neighborhood safer.

Barbara Miller is a senior staff associate with the Social Science Education Consortium, Inc., in Boulder, Colorado.

Student Handout

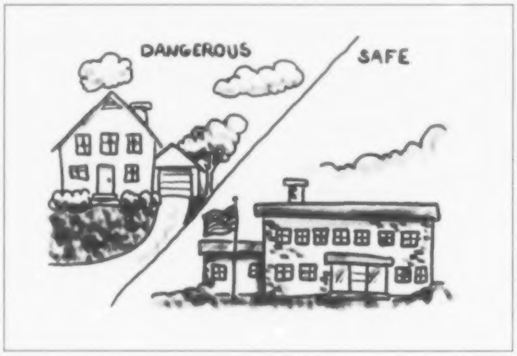
Mental Mapping: Where Are the Safe and Dangerous Places?

As an individual, and then in a work group, make a map to tell the class about violence in your community. Use lines, colors, symbols, words, and pictures that would help an outsider understand issues of violence from your experience and perspective.

1. Before making your own map, consider these questions:
   Where are the dangerous places? Why are they dangerous?
   Where do you feel safe? Why do you feel safe there?
2. Select two or three of the most important places in each category to feature on your map.
3. Repeat 1 and 2 in your work group.
4. Plan a two-minute presentation to explain your work group's discussion.

Individual Map *Jacob Lieb, Riverton, Wyoming*

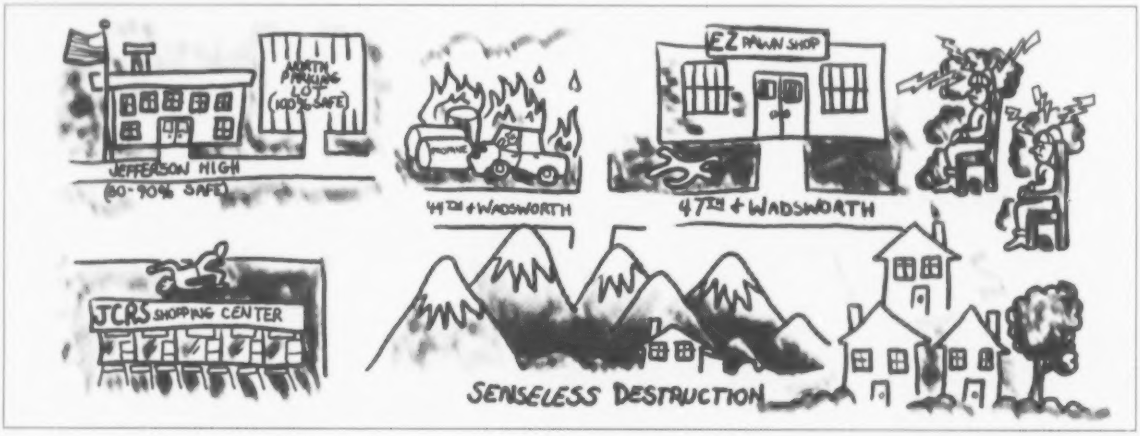
This student developed a conceptual map (adapted at right) that features two buildings: a home and a school. He explains that "All the violence starts and ends in the home. If children are raised correctly, they will understand others and have tolerance and not feel a need for violence." He went on to say that home is where prevention of violence begins as well. "School is the safest place to act tough. No matter what, an authority figure will be close by and be able to stop anything soon after it starts. If someone really wants to hurt you, they will fight elsewhere."



Group Map *Jefferson High School, Edgewater, Colorado*

Jefferson High School students developed a map (adapted below) that highlighted several violent tragedies near the school: people killed at a pawn shop, bodies found behind a shopping center, and a fiery crash in which a teenager driving a stolen car burned to death following a high-speed chase. Safe places on their map included "the mountains" a short drive away, their homes, and their school, with the exception being the north parking lot, where the "stoners" hang out. (The map shows this lot as 100 percent safe, however, because one group member perceived it that way.)

This group of students is planning a "peace wall" to feature youthful victims of violence. The wall is modeled after the Vietnam Memorial in Washington, D.C. Barbara Schrader, adult advisor to the group, remarked that her mental map of violence would be different. She would have talked less about gangs and more about "wannabes" and the violence that often results from house parties where adults are not present.



Student Forum

Crime and Community Schools Program

Students express their views on participation in a crime-prevention program

Frank Kopecky

Update on Law-Related Education, 19.2, 1995, pp. 44–48. © 1995 American Bar Association.

To the Teacher

The Student Forum is a student-organized open discussion of a legal issue. Your role is to provide copies of materials to the students and to serve as a consultant. The forum is expected to take from two to five class periods depending on the number of characters included and the amount of discussion involved. Copy and distribute forum pages 44–48 to each student. You will need two copies of the ballot on page 48 for each student.

To the Student

In the forum, you will consider whether your local school district should participate in a program that provides funds to local school districts for crime-prevention activities. The funds are a part of moneys that are available under a local block grant received by the state.

The state government has initiated a program that allows local organizations and governments including schools to apply for funds. The state superintendent of schools has issued guidelines for application and has made the announcement at the right.

Crime and Community Schools Program

All local schools are encouraged to cooperate with community organizations, local governments, and citizens who live in the immediate vicinity of the schools to develop crime-prevention programs. Under the block grant concept, a wide range of programs can be developed. They may provide for the use of school buildings on weekends, during hours in which school is not in session, and even during the day when school is in session as long as the programs do not interfere with the educational mission of the school. In addition, the school district may develop programs that use community members in the delivery of educational and educational-support activities.

The block grant concept is to give local communities considerable discretion in determining what they need to battle crime. Schools may develop programs such as social service counseling for youth, recreational activities, and day care and after-school activities for children with working parents. Adult education and programming for senior citizens are allowable. There really is no limitation on the use of the funds as long as they are justifiable in the sense of developing a stronger community, they are consistent with the school's primary mission of delivering education, and they will tend to prevent crime.

The local school district is proposing that the school should become a community center with a wide range of programs going on during the day, in the evening, and on weekends. Also, community members will be trained to become teacher aides assisting in classroom teaching and the library and in the general supervision of the schoolchildren. Several community members have gathered to discuss the proposal and to decide whether to participate.

Frank Kopecky is a professor of legal studies at Sangamon State University in Springfield, Illinois, and editor of the Illinois State Bar Association Law-Related Education Newsletter.

Do you think your local school district should participate in this program? What should the extent of programming be? Explore your personal views, and listen to others' views.

The purpose of a forum is to reach a conclusion that virtually all participants can agree with, or at least tolerate. So, in the course of discussion, try to determine differences and areas of agreement. Explore compromises and other ways of reaching a consensus. In some instances, conflicts may be resolved by majority vote. Look for other types of solutions as you conduct the forum.

Before the forum begins, you will complete a ballot to identify your attitudes about youth and crime. Following the forum, you will complete another ballot to determine whether your attitudes have changed.

How to Conduct a Forum

1. The class selects five students to serve on the forum panel.
2. All students complete the pre-forum ballot and submit it to the panel.
3. All students form groups to develop or adapt character sketches for the forum. Sometimes it increases learning and understanding to play a role that is the opposite of your beliefs.
4. The class members identify community members that they want to invite to participate in the forum. With the teacher's permission, panel members invite guest speakers.
5. The panel selects student volunteers to serve as facilitator and clerk. It also identifies the students chosen to role-play the characters.
6. The clerk schedules the presentations of the characters and the guest speakers.
7. The students conduct the forum.
8. The class members discuss what policies they would implement.
9. All students complete the post-forum ballot. The panel reviews, compares, and summarizes the results.
10. The panel submits the tally to the American Bar Association.

Getting Ready

To prepare for the forum, read two or more articles in this issue of *Update;* read newspaper or magazine articles about crime in your community, crime-prevention programs, and debates in Congress about a crime bill. Discuss these articles in class. Then brainstorm viewpoints that support and oppose the proposed use of the schools.

List all the ways that schools could be used to assist the community. Then list ways that community members could assist the schools. During the initial listing do not be judgmental and critical of the ideas. After all ideas are listed, evaluation and comments may take place.

As a class, identify community members whom you want to invite to participate in the forum. You may wish to ask, for example, a person who works in the criminal justice system, a community organizer, or a school official.

Organize into groups of up to five students. With your group, choose a character whose viewpoint you will develop. Make sure that all viewpoints are represented and that there is a reasonable balance of conflicting viewpoints.

These pages include sample character sketches. You may use or adapt these sketches or create your own. Your character sketch should include the character's name, a specific viewpoint, background information about the character that supports the viewpoint, and a request for a specific position to be adopted. After you have developed the character sketch, select a group member to play the character's role in the forum. Give a copy of your character sketch to the panel, and tell the panel who will role-play the character.

Student Roles

Panel

The panel organizes the forum. Members tally and submit the results of the pre-forum and post-forum ballots. The panel sends ballot data to the ABA. It invites community members to participate in the forum upon recommendations from the class. It reviews and selects characters to be included in the forum and selects student volunteers to serve as clerk and facilitator. It provides a list of student and guest participants to the clerk. During the forum, panel members serve as members of the audience.

Clerk

The clerk receives a list of characters and guest speakers from the panel. The clerk then schedules the speakers for the forum. He or she should schedule the speakers in a way that allows a balance of viewpoints to be presented. The order of presentation is not critical since the facilitator will allow for questions and discussion following each speaker. The clerk presents the schedule of speakers to the facilitator. During the forum, the clerk may wish to take notes.

Facilitator

The facilitator opens the forum with a statement of purpose, such as, "We are here to discuss proposals to use the schools as community centers." The facilitator calls speakers to present their viewpoints in three-minute periods, which are timed. She or he then encourages discussion and questions, again for about three minutes. The facilitator should be sure that opposing and supporting positions are heard. There should be additional discussion after all speakers have completed their presentations. Areas of agreement and disagreement should be noted. It is unnecessary to reach a consensus. The facilitator closes the forum.

Audience

The audience (students who have not assumed roles as clerk, facilitator, or characters) participates by listening to testimony, asking questions, and discussing the issues.

Characters

Characters have three minutes to discuss their positions and views about what the schools should do. They have two to three more minutes to respond to questions from the audience or other characters. They should answer consistently within their roles.

Character 1 My name is Charles Wood, and I work as a school administrator for the local district. While I can understand the desire to fully use the school building and bring community involvement into the school, I am concerned about the misuse of the building. We already spend a great deal of money on security; yet we have incidents of violence and vandalism in and around the building.

How are we going to control the building if we invite even more people in? You simply cannot run bingo games for senior citizens, use the gym for basketball, and have persons coming in and out of the building for counseling and still maintain an educational environment.

Furthermore, the idea of using parents in the classroom conflicts with state licensing provisions and the goal of improving the professional qualifications of teachers. I am not opposed to using the building for those things that help children, such as breakfast programs or extended day care after school, but we cannot become all things to all people. Schools must remember that their mission is education.

Character 2 I am Elaine Santorus, and I work for a local community organization. I think the idea of applying for funds under the block grant is a good one. One of the best ways to address the problem of crime is to address its root causes and encourage local communities to become involved.

Schools are a major asset to a community. In rural, suburban, and urban areas, schools are often the most substantial public buildings. It seems ridiculous to leave such a community asset idle most of the week. There are numerous programs and activities that can be run before and after school hours and even some that can be run during the day with minimal disruptions. Nonetheless, Mr. Wood's concerns are valid, and we must be conscious of security and not interfering with the school's mission.

I am not talking of just sharing building space but of an effort to integrate the schools into the fabric of the community. Parents and others with some training could assist in the delivery of education in the classroom, tutoring or monitoring children's behavior. These activities may provide some income to parents, as well as help to the schools.

School officials are always complaining about the lack of community and parental support for education. Maybe schools could have evening classes to teach parents how to help with their children's education. While they're at it, they could teach parents how to become involved in other activities that would benefit the community.

Character 3 My name is Pat Hale. I am a 19-year-old girl who lives in the neighborhood. Since graduating from high school, I have attended a community college and have worked at some part-time jobs. There are few opportunities in this community for young people to do something constructive and to gain some respect. It is hard to find a good job without skills and an education, and it is almost impossible to get an education without money.

Many of my friends have joined gangs and use drugs. Gangs give you a place to belong and a system of friendship and support. The schools could offer neighborhood youth something to do and an alternative to the streets. Critics contend that programs such as midnight basketball are a waste of money. But they give kids something to do and, if properly handled, the programs could be used to encourage kids to enroll in job training or educational classes. Schools need to reach out to the community and provide meaningful activities. Right now, in order to attend classes, I have to go across town and switch buses several times. It would be helpful to have some of these classes taught right here.

Character 4 My name is Bob Peal, and I am a correctional officer at the local jail. I used to work as a police hall monitor in this school. I think all this business about community involvement is being oversold. The best way to prevent crime is to hold youth accountable for their actions. We need to find people who are committing crimes and put them in prison for a long time. There is a need for more discipline and control. Schools should be safe islands where children can go to learn. Programs such as those being proposed bring some of the worst type of people into the schools. They will be disruptive and create a dangerous situation for those children who want to learn.

There is entirely too much coddling of the criminal element. If I had my way, juvenile court and all these programs would be abolished, and we would return to strict law and order. I might be willing to consider the use of the building by the new community policing unit or by a drug-education program developed to fight drug abuse. Also, maybe some of the kids who are kicked out of regular school could be required to attend evening classes as an alternative.

Character 5 My name is Fran Kibosh. I am a teacher at the school. I think the idea of applying for the grant is a good one. I have some concerns about security and the possible abuse of the building, but I think these can be worked out.

Involvement of the community in the schools is a great idea. I teach value and citizenship education in the classroom. Citizenship involves respect for others' ideas and a willingness to participate. We talk a lot about involving parents and the role of the community in the schools. This grant is an opportunity to put our words to work. I think the schools could benefit from this grant in numerous ways. Funds could be used to expand the library and to purchase computers. Both students and the community could use these new resources. We have talked about establishing mediation and a dispute resolution center. We could train both students and their parents in these skills. The trick in all this is proper planning and community involvement. We don't have to choose between education or community participation. We can do both.

Crime will be reduced if we give people the opportunity to gain a sense of control over their future. We have to help people avoid crime, and give others the opportunity to rehabilitate themselves.

Character 6 I am a retired minister, and my name is Edward Vizer. While there may be a need for recreational programs and a safe place for senior citizens to meet, I don't think it should be the schools. There are plenty of other places to gather. School should be for education. We need to return to the basics—reading, writing, and arithmetic—and forget about all these fancy new ideas.

I believe schools would be better places if the Supreme Court had not prohibited school prayer. Respect for authority, discipline, and a willingness to accept responsibility are missing. Right now I am working with a group of students who meet after school to discuss religion and values. This is the type of program and these are the types of young people that should be encouraged. I am really worried about all the teenagers who are having children before they're even old enough to properly care for them. Maybe there is a role for some kind of program that could teach teenage mothers and fathers about family values and parenting skills. I am not an expert on crime prevention, but such a program may reduce child abuse and domestic violence, and it would use the school to benefit students.

Character 7 My name is Bill Barber. I am a member of the local school council. I have listened carefully to all the comments thus far. There seems to be both a lot of disagreement and agreement. I think it is important to let democratic processes function and to anticipate legitimate differences among people.

This grant is an opportunity for our community to do something to help ourselves. We must search for common ground. Maybe we can design a proposal that will address the concerns and interests of us all. There may be a need to involve more police and to make certain that the primary mission—education—is stressed. If these concerns are addressed, then other important community needs can be satisfied.

These block grant programs give each community the right to determine what can best meet its needs. We should continue to discuss the issues until we reach a consensus on what is important. Granted, there may be some programs on which we can never reach an agreement, and there may be others where decision by majority vote may be appropriate. But I think we all can agree that there may be a need for educational programs outside regular school hours. Maybe we should begin with that issue and see what follows. ◆

FORUM BALLOT

Reducing Crime and Violence: What Should Be Done?

Circle the choice that best answers how you feel about the issue.

	strongly agree				strongly disagree
I believe that communities should adopt programs to					
1. Increase the number of police through community policing programs	1	2	3	4	5
2. Develop counseling, recreational, and other rehabilitative programs for youth	1	2	3	4	5
3. Restrict the use and availability of handguns	1	2	3	4	5
4. Assign more police to the schools	1	2	3	4	5
5. Increase youth employment and job training opportunities	1	2	3	4	5
6. Notify schools anytime a youth is caught using drugs or alcohol	1	2	3	4	5
I believe that schools should					
7. Expel students who engage in violent behavior	1	2	3	4	5
8. Emphasize character and values education in classes	1	2	3	4	5
9. Make schools safer by searching students and lockers periodically	1	2	3	4	5
10. Teach mediation and other alternative dispute-resolution techniques	1	2	3	4	5
11. Prohibit the wearing of gang colors	1	2	3	4	5
12. Work with community groups to use the school as a community center	1	2	3	4	5
I believe that the criminal justice system should					
13. Increase the penalties for crimes, building more prisons if necessary	1	2	3	4	5
14. Develop programs that can work with youth in the community	1	2	3	4	5
15. Sentence young people as adults when they commit violent crimes	1	2	3	4	5
16. Use youth juries	1	2	3	4	5
17. Train specialized police officers to monitor youth behavior	1	2	3	4	5
18. Prohibit driving privileges and school activities for youth using drugs or alcohol	1	2	3	4	5

Complete the sentences below based on your personal opinion.

19. The most important thing that local communities can do to reduce criminal behavior is

20. Schools can be most effective in the reduction of crime by

21. The most useful measure that the criminal justice system can take to discourage crime and violence is to

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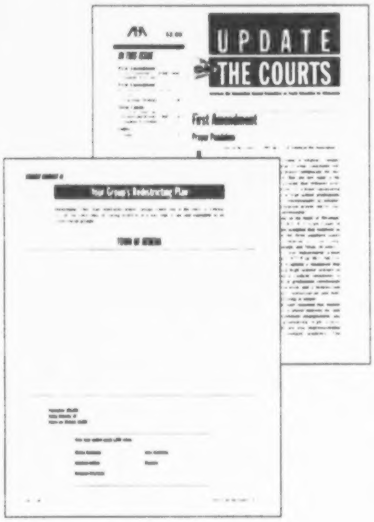

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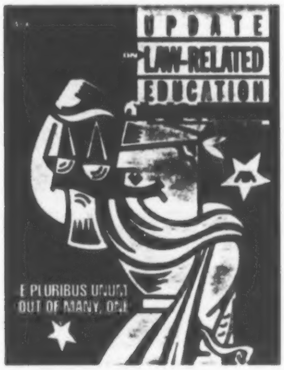

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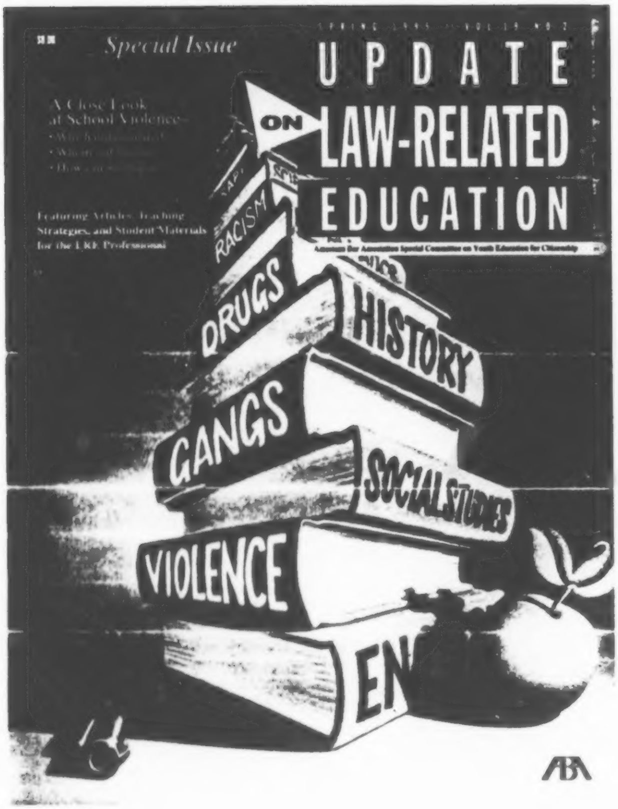
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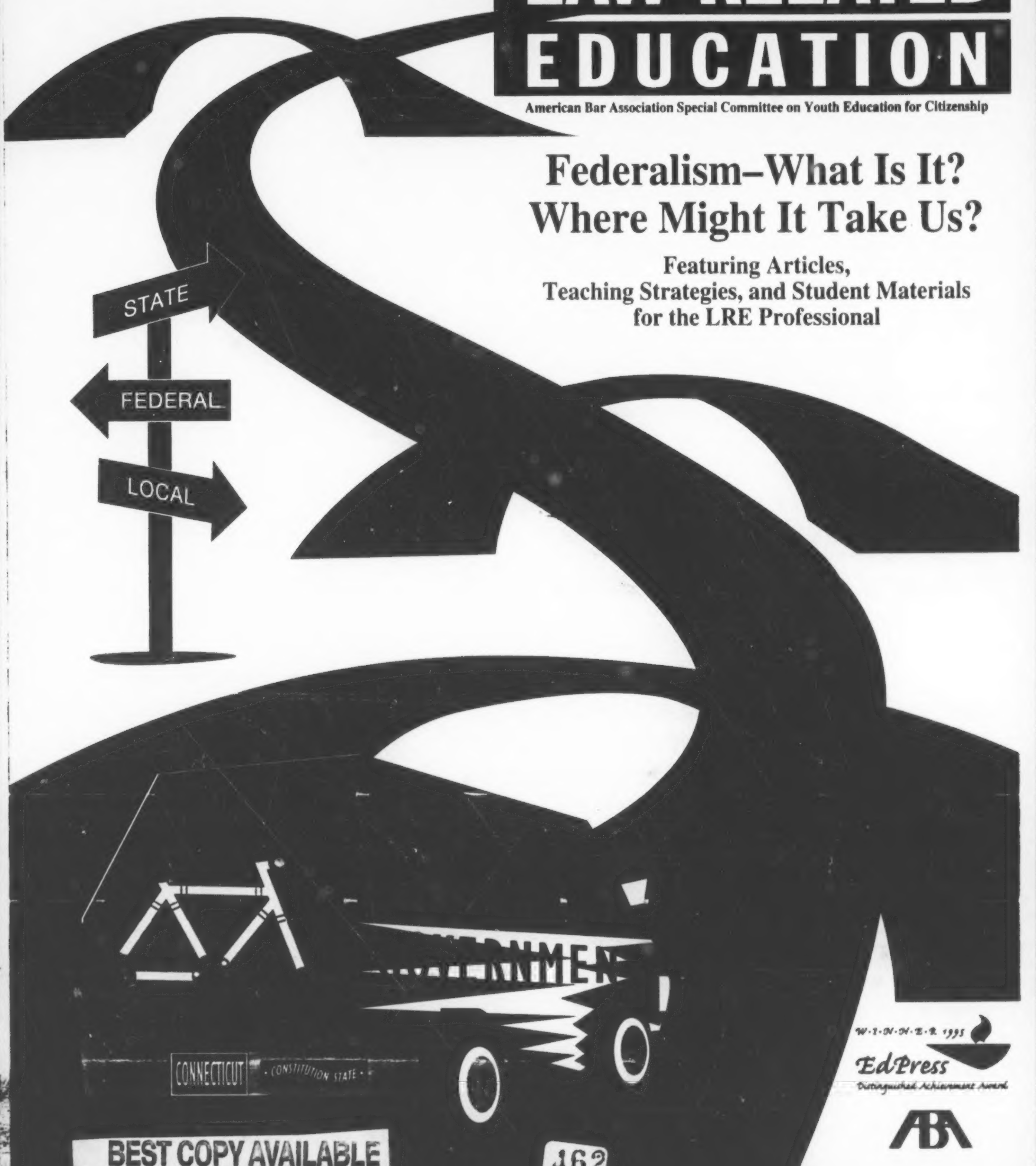
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Subject Matter	TS p.9	TS p 16.	TS p. 29	TS p.30	TS p.37	SF p. 45
How power is structured and how it functions in societies	x	x	x		x	
What key concepts and attributes are of U.S. constitutionalism						
...popular sovereignty	x	x				
...federalism (system of shared powers)	x	x	x	x	x	x
...enumerated rights	x				x	x
...capacity for and specific practices of constitutional amendment and change						x
U.S. Constitution and Bill of Rights	x		x		x	x
Contexts and Practices of Instruction						
Access to, and use of, community resource leaders						x
Access to, and use of, exemplary instructional materials	x	x	x	x	x	x
Student-centered classroom	x		x		x	x
Problem-oriented approach to instruction	x	x	x	x	x	x
Instruct interactively						
...use cooperative learning strategies, simulations, and role plays	x	x	x	x	x	x
...use group work activities, including group research projects	x	x	x			x
Use demonstrations and lectures, as appropriate, to instruct students about the law and legal issues	x	x			x	
Incorporates peer assessment and self-assessment			x	x		
Bases assessment on performance and outcomes	x	x				x
Skills						
Conducting personal interviews or engaging in field research about legal issues		x	x		x	x
Organizing information	x	x		x		
Analyzing and interpreting judicial opinions and other legal documents or issues		x			x	
Making informed decisions about situations involving the law and legal issues	x	x	x	x		
Articulating and expressing ideas, beliefs, and opinions regarding legal issues			x	x		x
Working cooperatively with others to make decisions and take actions concerning hypothetical or actual legal and law-related social issues	x	x		x	x	x
Attitudes, Beliefs, and Values						
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Understanding how collective values, beliefs, and dispositions reflect and shape law	x	x	x	x	x	

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Foreword

Modern federalism is an original American contribution to democratic government. The United States is the first continental-size polity ever governed in a reasonably democratic and humane way.

Before 1787, most people believed that democracy could work only in small republics. Even those were rare. Large political systems covering huge territories were all imperial, such as the Babylonian, Mayan, Ottoman, and Roman empires. Even after 1787, except for the United States—and then confederal Canada and federal Australia—most territorially large governments were still imperial, such as China and the Soviet Union.

This is one reason why many Americans did not believe that the 13 states could unite under a common government—even one with only limited powers—and still be free and democratic. The historical odds were against success. Yet, American federal democracy has flourished for 206 years.

The framers of the U.S. Constitution solved a fundamental problem of human governance and liberty. They did so by inventing a federal form of democracy that tries to maximize the democratic and economic advantages of both small and large republics by minimizing the anarchistic temptations of small republics to fight each other and the monopolistic temptations of large republics to become tyrannical.

During the hot summer of 1787, when the framers drafted the Constitution in Philadelphia, they hardly knew if the people of the 13 states would accept their possibly dangerous invention. Little did they know that it would succeed at home and also become a tool for democratic reform in a world of 5 billion persons at the dawn of the 21st century. They surely didn't know that their invention would launch a popular TV series featuring different races and species piloting starships for a United Federation of Planets. Indeed, aside from *Star Trek*'s drama, it is perhaps the vision of the peaceful, democratic federation of a wonderfully diverse universe that appeals to audiences.

This is not far-fetched. The seeds of American federalism were planted by the Puritans' federal, or covenant, theology. The word *federal* comes from the Latin *foedus*, meaning "covenant." The Puritans saw the universe as federal, based on the covenants between God and Israel at Mt. Sinai and between Christ and humanity at Jerusalem. Men and women then covenanted in marriage to create families; families covenanted to establish congregations; congregations covenanted to found republics; and small republics covenanted to create larger political systems. This is why the Mayflower Compact of 1620, which was a civil covenant, is an important part of America's federal heritage.

Although the Puritans' federal theology had declined as a formal system by 1787, covenanting and compacting were embedded in America. The first written constitutions, which were developed in the colonies and the states before the U.S. Constitution, stemmed partly from this tradition. The Massachusetts Constitution of 1780, which speaks of covenant as the only proper foundation for political life, is the oldest written constitution still in force in the modern world.

The covenant idea was reinforced by the "social compact" theories of English and Scottish philosophers, such as John Locke (1634–1704) and David Hume (1711–76), who wrote after Americans had already refined covenanting. These thinkers supplied secular reasons for political covenants (constitutions by the 1780s) in a new American society, which, being territorially vast and religiously diverse, could not base a common constitution on a divine idea.

Hence, the founding was paradoxical. Delegating powers from the 13 state constitutions to a Constitution for the 13 states took a huge leap of faith. Could covenanting secure an empire of liberty that would not mutate into an empire of tyranny? Yet, because covenanting was so commonplace, debating, ratifying, and implementing the Constitution were all rather ordinary events for Americans. Federalist and Anti-Federalist leaders wrote weighty pamphlets for and against the Constitution, but the average person probably said, "Here we go again."

Today, we are again engaged in debate, although neither the Constitution nor the union is in doubt. In question are (1) the nature of our federal democracy and (2) the proper powers of the federal government and the states under our federal Constitution and within our free-market economy. This debate is shaped by today's experiences, just as the original debate was shaped by the founders' experiences.

In 1787, many Americans believed they faced rising anarchy, namely, warfare among the states. The Articles of Confederation were too brittle to restrain the explosive forces of state sovereignty, and the confederal Congress was too weak to do anything about it. Today, many Americans believe they face a rising monopoly, namely, too much power grabbed by the federal government. The Constitution has been stretched too thin to restrain the expansive forces of federal power, and the "inside-the-beltway" crowd seems too haughty to do anything about it.

At the same time, in 1787, many Americans had had good experiences with their state governments; hence, they were fearful of delegating some state powers to the new federal government. Could this federal government be trusted to do what is right? Many Americans today have had good experiences with the federal government; hence, they are fearful of restoring some of its powers to the states. Can the states be trusted to do what is right?

Yet, many Americans believe the federal government has overreached its constitutional powers. Trust in the federal government, and in all governments, has declined steadily since the late 1960s, despite many programs enacted to benefit citizens. The federal budget has run deficits every year since 1968 (unprecedented in U.S. history), despite the "peace dividends" promised after Vietnam and, again, after the Cold War. The U.S. economy has performed less well for most Americans since 1972 than it did from 1946 to 1972, despite phenomenal increases in federal regulation and in federal preemptions of state and local powers. Federal programs enacted to do good too often do poorly, despite billion-dollar price tags that add up to 23 percent of the nation's gross domestic product. Young Americans also face uncertainties in a very competitive marketplace, and many wonder if the 7.65 percent Social Security/Medicare tax on their earnings will pay off in their old age.

Not all beliefs are accurate, however. Many people believe that the bureaucracy in Washington, D.C., becomes ever more bloated. Not so. There are fewer federal bureaucrats for each American today than there were when Dwight D. Eisenhower was president (1953–60). There are 2.8 million federal civilian employees now, compared to 3.1 million as recently as 1991 and to 15.7 million state and local government employees (including public school teachers) today.

On the social welfare front, programs for the elderly have reduced their poverty rate from about 25 percent in the mid-1960s to about 12 percent today. And for African Americans, Latinos, other minorities, and women, the federal government in recent decades has been an indispensable partner in freedom.

Nevertheless, there is great anxiety about the future. One price of expanded federal power has been the forward push onto our children and grandchildren of a still growing $4.9 trillion debt, as well as a lateral pass to states and localities of billions more in costs. Therefore, fiscal discipline (e.g., a balanced budget rule, already present in 49 states), political discipline (e.g., campaign-finance and lobbying reform), constitutional discipline (e.g., term limits and reviving the Tenth Amendment), and other reforms have all sparked public interest.

Both Democrats and Republicans in Washington speak of restoring a better federal-state-local balance by returning more power to the states and their local governments. The purpose would be not only to produce a "pay-as-you-go" federal government, but also to get federal officials "back to basics."

Two basic federal duties under the Constitution are commerce (i.e., maintaining a free-trading common market) and foreign affairs and defense (i.e., asserting leadership in the world). In this century, we have embraced two more basic federal duties: individual rights protection through the Fourteenth Amendment (1868) and income redistribution (i.e., social welfare). Americans disagree on specific policies (e.g., how far should the federal government go in regulating the economy or helping the poor?), but there is little disagreement on these four duties.

Additional purposes of restoring more powers to states and localities would be to (1) bring government closer to the people, (2) allow our 50 states and 84,955 local governments to respond more effectively and efficiently to our diverse interests and conditions, and (3) unleash the creative energies of states and communities as laboratories of democracy. Just as biodiversity is essential for a healthy ecosystem, so too may government diversity be essential for a healthy polity.

Can this be done without destroying what's good about the federal government and without reviving what can be bad about state and local government?

Only you can decide after you examine the issues. We hope that the articles and activities in this issue of *Update* will stimulate your thinking and encourage you to treat your own vote as being just as important for the future of "our federalism" as the vote of our forebears who bequeathed to us such a remarkable experiment in federal democracy and liberty.

John Kincaid

John Kincaid
Robert B. & Helen S. Meyner
Professor of Government and Public Service &
Director of the Meyner Center for the
Study of State and Local Government
Lafayette College
Easton, Pennsylvania

Historical Perspectives

Federalism is a key structural guarantee of freedom; but the allocation and preservation of competing state and national interests have always been difficult and are destined to remain so.

Commerce, the Tenth Amendment, and Guns in School

Douglas W. Kmiec

James Madison, a principal drafter of the U.S. Constitution, wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite" (*Federalist* No. 45).

If asked today, most Americans would not likely describe the powers of the federal and state governments in this way. Many observe that the federal government now intrudes greatly into everyday life and family budgets. Few people know that Congress's ability to engage every issue began only with the New Deal of the 1930s. Expanded federal power hinges primarily, though not entirely, on one constitutional provision: the authority of Congress to regulate interstate commerce.

Health care, education, housing, civil rights, criminal justice, economic redevelopment, land use and the environment, and many more subjects have all been touched or even absorbed by federal law on the theory that each affects—however remotely—interstate commerce. There are two uncomfortable realities about this theory: first, it is true at its most general level, and second, the admission of its truth seems to make the federal structure envisioned by the Constitution an impossibility.

Because we are ecologically and economically interdependent, every person's action, from mowing one's yard to allowing a family merely to consume the wheat grown on its own farm, "affects commerce." But if that is so, every action is potentially subject to federal regulation.

Yet, our founders thought it unwise to rely on centralized, national authority to handle locally diverse and sometimes minute questions. The founders were convinced as well that one of the best ways to secure personal freedom against tyranny was to divide power. As Justice Sandra Day O'Connor has noted: "the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather federalism secures to citizens the liberties that derive from the diffusion of sovereign power. ...' "

Nevertheless, many people favoring the sovereign interests of the states opposed the adoption of our 1787 Constitution. They thought a government that was "neither national nor federal, but a combination of both" was unworkable and destined to become wholly national. Samuel Adams warned that if the proposed constitution was ratified, "the Idea of Sovereignty in the States must be lost." Trying to calm this fear, Madison argued in *The Federalist* that the national power would be "exercised principally on external objects, as war, peace, negotiation, and foreign commerce; ... The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people."

Madison wasn't completely convincing. Eight of the nine original states needed to ratify the Constitution did so only after requiring that a statement of state sovereignty be added to the document. That statement became, after ratification in 1791, the Tenth Amendment. The amendment provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Presumably, with the Tenth Amendment in place, an exercise of federal power requires a proper grant of authority. One such grant is Congress's power under Article I, section 8, to "regulate Commerce ... among the several States." However, stated authority is one thing, interpretation is another. To identify what the Tenth Amendment reserves to the states, one must know what is included in the term *commerce* and what it means to be "among the several

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Douglas W. Kmiec is professor of constitutional law at the University of Notre Dame in Notre Dame, Indiana, as well as Leonard and Dorothy Straus Distinguished Chair in the Law, Pepperdine University, Malibu, California, 1995–96.

States." Here is where the story gets interesting.

The main reason for giving Congress the commerce power was to eliminate trade barriers among the states. Much of the early case law focused on state regulations that had adverse economic effects beyond a state's borders. In *Gibbons v. Ogden*, 22 U.S. 1 (1824), Chief Justice John Marshall struck down a New York law that tried to grant an exclusive right to operate steamboats between New York and New Jersey. Marshall was careful to highlight, however, that the problem with New York's legislation was its interstate scope. It would be different, he noted, if the state had regulated matters "completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states."

But what commercial matter is completely internal to a state? Even small actions within a state can be said (theoretically at least) to affect people outside of the state. The Court recognized this in later cases. For example, in the *Shreveport Rate Case*, 234 U.S. 342 (1914), the U.S. Supreme Court held that intrastate (within one state) railroad rates affect interstate (between states) rates. In *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court ruled that consumption of one's homegrown wheat affects national production and, thereby, wheat prices.

If powers reserved to the states cannot be identified with the interstate qualification of Congress's power, maybe the meaning of the Tenth Amendment's reservation lay in the definition of commerce. The Court tried this approach, too, from the late 19th century until the late 1930s. For example, the Court refused to extend the commerce power to uphold federal regulation of intrastate sales of hazardous fuel, *U.S. v. DeWitt*, 76 U.S. 41 (1870). The Court also declined to break up a monopoly of sugar manufacturing, *U.S. v. E.C. Knight Co.*, 156 U.S. 1 (1895). In the latter case, the Court defined *commerce* as excluding economic activities that occur before trade, such as manufacturing, farming, and mining.

A definition of commerce that focuses on trade or exchange is logical. It is also consistent with the original purpose of the commerce power. But the Court abandoned this approach, too. This time it wasn't economic interdependence or even constitutional text and history that caused the Court's change of mind. It was the Great Depression that began with the stock market crash of 1929. This national economic emergency created tremendous political support to regulate wages, hours, and working conditions. The Court resisted supporting such regulations at first. When President Franklin D. Roosevelt proposed reshaping the Court by adding six new justices, the Court relented. By a narrow 5–4 margin in *National Labor Relations Bd. v. Jones & Laughlin Steel Corp*, 301 U.S. 1 (1937), the Court upheld the National Labor Relations Act. Congress strongly rejected Roosevelt's "court-packing" plan, but ever since, the Court has largely deferred to Congress's ideas about what it can and cannot regulate as "interstate commerce."

With the passing of the Depression and World War II, it seemed that the federalist balance of the original constitutional design would return. As one Supreme Court justice observed, it was still possible to speak as recently as the 1950s of a "burden of persuasion on those favoring national intervention." But gradually, the burden shifted, and the political administrations of the last thirty years assumed the existence of federal power to address even the most local subject. In the words of Justice O'Connor in a 1980s dissent, "the extraordinary [had] become ordinary."

But not without consequence. We see that consequence most clearly in the size of the federal deficit. It is also present in the more subtle costs of centralization. Enacting federal solutions for local problems has meant a disregard for the sovereignty of the states, less political accountability, and an acceptance of "one size fits all" answers for matters better resolved locally or with greater variation. In the end, what we experience is a loss of personal freedom.

This year the Court said, "Enough." In *U.S. v. Lopez*, 115 S. Ct. 1625 (1995), the Court held that a law making it a *federal* crime to possess a gun in *local* school zones exceeded Congress's delegated authority. Although *Lopez* does not resolve what precisely falls within the national commerce power, it supplies some clues. Consistent with the original trade focus of the commerce power, *Lopez* affirms Congress's ability to regulate the "channels of interstate commerce." These include roads and navigable waters, as well as "instrumentalities" within such channels—from trucks to airplanes to telecommunications. Within this category, too, the Court made plain that Congress can keep items out of commerce, including perhaps—in the tragic aftermath of Oklahoma City—"cop-killer" bullets, assault weapons, and other tools of terrorism.

Less clear is what the federal government may regulate when something has only "a substantial relation to interstate commerce." Part of the *Lopez* opinion suggests that the Court may return to an earlier effort to distinguish between direct and indirect effects on commerce, ruling out the more remote effects. The Court also warned that when Congress regulates under its commerce authority, the regulation better have some genuine connection to "economic activity."

But it seems unlikely that the Court will long treat "commerce" and "economic activity" as synonymous. Perhaps the Court will return to the founders' understanding of commerce as trade or the actual *exchange* of goods and services. If so, dealing with wages, hours, and working conditions would be returned to the states, and substantial federal regulations would need to be set aside.

Lopez's narrowing of the commerce power seemingly signals greater respect for the reserved powers of states. The decision comes at a time when the states are objecting to federal mandates. As a constitutional matter, both funded and unfunded federal commands limit state authority.

Funded commands, however, have been rationalized as permitted "conditions" on state "acceptance" of federal grants or funds, such as for highway construction or Medicaid. As a practical matter, states have little choice but to accept federal funds with strings attached. If the states refused, they would forfeit the federal taxes their citizens pay for these programs. For example, when you pump gas in your car, the price per gallon on the pump includes an 18¢ federal tax and, on average, a 19¢ state tax. The 18¢ federal tax raises billions of dollars every year for highway construction and other transportation programs. If a state were to withdraw from the federal highway program in order to avoid federal commands, the state would lose millions, sometimes billions, of dollars of federal aid derived from the 18¢ tax. However, the state's citizens would still have to pay the 18¢ federal tax at the gas pump even though the state withdrew from the highway program.

States are seeking a political solution to the problem of funded mandates. For example, Congress could return tax revenues for large programs, such as education, transportation, and health, in "block grants" with few, or no, strings. Some state advocates go further. They argue that the federal government should stop collecting and disbursing revenue for these subjects altogether, except for genuine interstate concerns.

Unfunded mandates pose a more sovereignty-insulting problem for the states. States are told what to do, but are given no federal money with which to do it. In *New York v. United States*, 112 S. Ct. 2408 (1992), the Court reminded Congress that it "may not compel the States to enact or administer a federal regulatory program." Relying on this favorable language, various states are challenging, with mixed results in the lower courts, administrative duties imposed by federal gun-control and voter-registration statutes.

These separate efforts at adjusting the state-federal balance are reminders of a brief period in the 1970s and early 1980s. At that time, the Supreme Court protected traditional state functions from direct federal regulation. After less than a decade, though, the Court abandoned the effort to define "traditional state functions." Instead, it told members of Congress to be sensitive to federalism. Congress found itself unable to exercise much, if any, self-restraint.

As of now, there is no new "bright line" to separate federal and state power. *Lopez* is simply a reminder that federal power is not without limit. The Court admits that its reasoning is not mathematically precise. Given the dynamic nature of constitutional decision making and the modern difficulties we face, the Court could not be precise. As Chief Justice Marshall predicted nearly two centuries ago, "the question respecting the extent of the powers actually granted [the federal government] is perpetually arising, and will probably continue to arise as long as our system shall exist." ♦

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Do You Know About Your State Constitution? Many People Don't

Has its own constitution	52%
Does not have its own constitution	11%
Don't know/No answer	37%

Source: Nationwide Public Opinion Survey, U.S. Advisory Commission on Intergovernmental Relations, 1991.

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The Rehnquist Court and the Tenth Amendment

Erwin Chemerinsky

Federalism and states' rights have been key areas of disagreement between liberals and conservatives over the course of American history. In this century, for example, in both the Congress and the courts, conservatives have opposed federal initiatives—such as labor laws, social security, and civil rights laws—based on their view of federalism. In constitutional law, the battle over federalism has been fought over the meaning of the Tenth Amendment, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Liberals generally see this as a simple reminder that Congress may act only if there is express or implied power in the Constitution; states, in contrast, may act unless prohibited by the Constitution. Conservatives, however, see the Tenth Amendment as doing more than this, namely, as protecting state governments from federal encroachments.

Therefore, liberal justices never would declare a federal law unconstitutional as violating the Tenth Amendment as long as Congress could point to some authority for adopting the law, such as the commerce power or the spending power. Conservatives, however, would conclude that even if Congress had the power to act, laws violate the Tenth Amendment if they unduly interfere with states' rights.

In the early part of this century until 1937, the conservative view was held by a majority of the Supreme Court justices. Hence, many federal laws, such as those prohibiting child labor and requiring a minimum wage, were declared unconstitutional as violating the Tenth Amendment. From 1937 until 1976, the liberal view was held by a majority of the justices, and not a single law was deemed to violate the Tenth Amendment. In 1976, in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Supreme Court found that the Tenth Amendment was violated by a federal law requiring state and local governments to pay their employees the minimum wage. But nine years later, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court overruled *National League of Cities* and concluded that the protection of states' rights should be through the political process in Congress, not by the judiciary.

Since 1985, however, there have been many changes on the Supreme Court. In fact, four of the five justices who were in the majority in *Garcia*—Justices William Brennan, Byron White, Thurgood Marshall, and Harry Blackmun—have since retired. Only Justice John Paul Stevens remains. The replacements have been far more conservative and, therefore, have a different view of the Tenth Amendment. The new justices—especially Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas—together with holdovers, Chief Justice William Rehnquist and Justice Sandra Day O'Connor, provide a majority that takes the conservative view of the Tenth Amendment.

Thus, the Tenth Amendment and state sovereignty have been resurrected by the Rehnquist Court as important limits on federal power. Two decisions in the 1990s have been expressly based on the Tenth Amendment, and others have been influenced by concerns over states' rights.

In 1991, in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Supreme Court held that a general federal law that imposes a substantial burden on state governments will not be applied to the states unless there is a clear declaration from Congress. *Gregory* involved a challenge by judges in Missouri to a provision in the state constitution that set a mandatory retirement age of 70 for state court judges. The judges contended that the Missouri constitutional provision was preempted by the federal Age Discrimination in Employment Act, which prohibits employers from having a mandatory retirement age. Justice O'Connor, writing for the Court, explained that setting a retirement age for judges is an important aspect of state power and that Congress must expressly declare its desire to restrict state governments. The Court said that the general federal law, which applies to all employers, would not be applied to the states unless Congress clearly indicates that it meant for the law to apply.

More dramatically, a year later, in *New York v. United States*, 112 S. Ct. 2408 (1992), the Court declared unconstitutional a provision of the federal Low-Level Radioactive Waste Disposal Act as violating the Tenth Amendment. The law required that every state clean up its low-level nuclear wastes by 1996 and that any state failing to do so would be deemed to take title to the wastes and then be liable for any harms caused by them. In a 6–3 decision, the Court concluded that Congress violated the Tenth Amendment by compelling state governments to adopt such laws and regulations.

Justice O'Connor, again writing for the majority, viewed the federal law as impermissibly conscripting state governments. Her opinion expressed con-

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Erwin Chemerinsky is Legion Lex Professor of Law at the University of Southern California Law Center in Los Angeles, California.

cern that such federal mandates undermine political accountability. State governments have to adopt laws and take the blame from voters, but it really is Congress that should be held responsible for forcing the states to act. Justice O'Connor indicated that Congress could regulate itself and set federal standards for the states to meet or that Congress could encourage state action by putting strings on federal grants. But what Congress cannot do is compel state legislative or regulatory activity.

These cases mark a rebirth of the Tenth Amendment, and it has become a fertile ground for litigation in the lower federal courts. For example, now pending are Tenth Amendment challenges to federal laws such as the Brady Bill, which requires state law enforcement officers to conduct background checks in connection with gun purchases, and the Motor Voter Bill, which requires states to facilitate voter registration in their departments of motor vehicles. Ultimately, such cases will make their way to the U.S. Supreme Court and provide opportunities for the Court to clarify the law of the Tenth Amendment.

At a minimum, it is clear that the conservative view of the Tenth Amendment again is controlling on the Supreme Court. The Tenth Amendment is not simply a reminder that Congress must have constitutional authority to act, it is also a constraint on federal power that the Rehnquist Court will use to protect states' rights. How far the Court will go in this direction, how much it will limit congressional power, will be determined in cases to be decided in the years to come. ◆

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Teaching Strategy

The Conundrum of Federalism: Can There Be Strong State Governments and a Strong National Government?

Mary Louise Williams

Background

A *conundrum* refers to a puzzle or dilemma for which a solution is not easily found. The framers of the Constitution, in designing the new federal system of government, did not designate which government—the states or the federal—was to have priority in every area of public life. As a result, the question has been one of the central constitutional and political issues throughout our history. Political parties have attempted to resolve the conundrum, only to discover that they have raised even more questions. This lesson invites students to participate in the conundrum by grappling with some of these questions.

Objectives

As a result of this lesson, students will

- Define *federalism* and *sovereignty* as determined by the U.S. Constitution
- Understand federalism as a fundamental part of American constitutionalism
- Analyze federalism as a source of conflict and cooperation between the states and the federal government

Target Group: Secondary students
Time Needed: 2–3 class periods

Mary Louise Williams has written a number of teaching activities for Update on Law-Related Education *magazine and guest-edited the fall 1993 edition—*The Right to Sustainability: The Environment, the Citizen and the Law. *A secondary teacher for 28 years, Ms. Williams now contracts as an education consultant in Santa Fe, New Mexico.*

Materials Needed: Student Handouts 1 and 2; copies of the United States Constitution and your state's constitution; transparency of the diagram

Procedures

1. Introduce the lesson by displaying the diagram from Student Handout 1 on an overhead transparency projector. Use the following questions to encourage discussion:

a. Where is the ultimate authority or power (*sovereignty*)?
b. What is meant by *through the National Constitution?*
c. How do *delegated* powers differ from *reserved* powers?
d. Do you agree with the size of the circles?
e. Where should the 50 state constitutions be placed on the diagram?
f. Who do you think created this diagram, a representative of the federal government or a state government?
g. For homework and/or assessment, have students create a diagram of the Tenth Amendment.

2. Draw three labeled columns, *Federal Government, Shared Powers,* and *State Governments,* on a transparency or the chalkboard. Ask students to brainstorm a list of powers that should go under each column heading. (For example, *To Declare War* is a federal power; *Taxation* is shared; and the States are responsible for *Education.*)

3. Distribute Student Handout 1 for silent reading or homework. Review the contents with students.

4. Distribute Student Handout 2. Review the list and point out that each category may have many subcategories and is complicated. The point is to get students thinking of services, regulations, protections, and powers that are necessary for a society to operate efficiently and fairly. Add other categories suggested by students.

5. Organize students into the following three groups:

- Group 1, Staters, who support stronger state governments.
- Group 2, Nationals, who support a stronger national government.

Each group believes it has the answers for best protecting the general welfare and individual rights.

- Group 3, New Voters (immigrants who have just taken the oath of citizenship) are trying to decide with which political party they would like to register.

6. Review the list of government activities from the brainstorming session and Student Handout 2. Clarify some of the reasoning and needs of each activity. Have the three groups meet separately. Have the Staters and Nationals create arguments to support their positions. Ask the New Voters to generate questions based on their needs as new citizens.

7. After the groups have prepared, reorganize the class into groups with three people each. In each group of three, have a Stater, a National, and a New Voter. Based on the prepared arguments, the Stater gives reasons for the voter to join that group. Then the National does the same. Each New Voter decides with which group he or she will register and why.

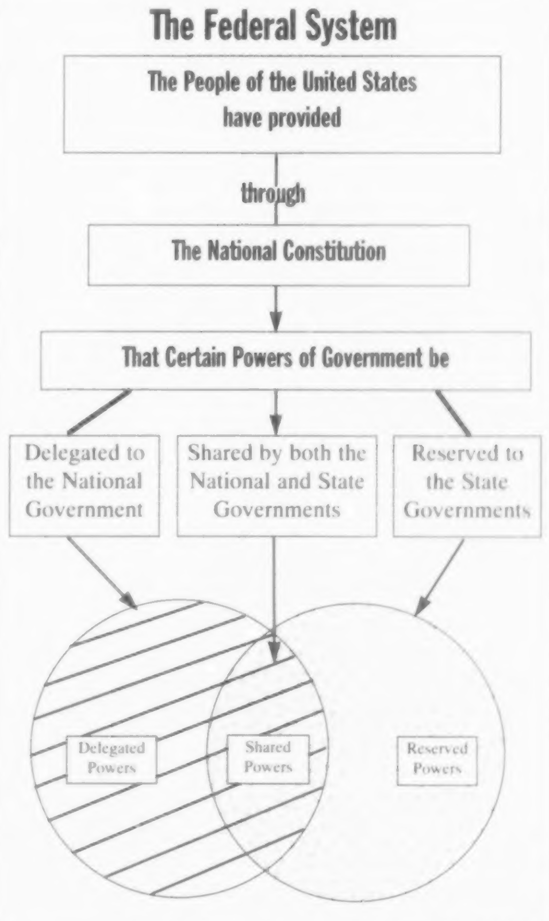
8. In the large group, New Voters announce their decisions and share what they considered the most convincing arguments.

continued on inside back cover

Student Handout 1

Federalism or the Federal System

The framers of the U.S. Constitution created our unique federal system and gave a new meaning to the term *federalism.* Examine this diagram from a 1940 textbook written by the federal government for "Use in the Public Schools by Candidates for Citizenship." Does it correctly represent federalism today?


The Federal System
The People of the United States have provided
through
The National Constitution
That Certain Powers of Government be
Delegated to the National Government
Shared by both the National and State Governments
Reserved to the State Governments
Delegated Powers
Shared Powers
Reserved Powers

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Tenth Amendment to the Constitution of the United States.

In the 18th century, federalism referred to leagues or confederations of independent nations that would unite by treaty for a common cause but keep their sovereignty. *Sovereignty* referred to the ultimate supreme power to make decisions for and take actions on behalf of the nation. Sovereignty was believed to exist in one person or one place—the king. In England after 1688, it was in the King/Parliament, as one. No political theorist of the time believed that sovereignty could be divided.

The framers of the Constitution had to resolve this question of where to locate the powers of sovereignty. If left entirely with the states, then there was no need to change the Articles of Confederation. If the new national government was to be the source of sovereignty, the states would never ratify it because they had been "tyrannized" by a strong national government (the King and Parliament).

The framers of the Constitution placed sovereignty with ***"We the People of the United States"*** as citizens of both the individual states and the United States. Limited powers were delegated to the national government; all other powers were left to the states. Both the states and the national government act as ***agents on the people's behalf.*** The framers did not designate which government was to have priority in every area; however, a basic purpose of the Constitution was to protect individual rights against state and national governments.

The framers ***enumerated*** powers of the national government and stipulated in the Tenth Amendment that unenumerated powers were ***reserved to the states or to the people.*** Actions that the national government could not do (Article I, Section 9), and others forbidden to the states (Article I, Section 10) were stated clearly. Federalism, then, became a system of divided powers.

In trying to determine how best to protect our general welfare and individual rights, the framers left us with a puzzle or a dilemma to solve—a conundrum. Searching for solutions has not been easy.

This diagram came from *Our Constitution and Government: Lesson on the Constitution and Government of the United States for Use in the Public Schools by Candidates for Citizenship* by Catheryn Seckler-Hudson, Washington, D.C., 1940, p. 82.

Student Handout 2

The Conundrum: Federal Authority and State Power?

Throughout our constitutional history, there have been tension and sometimes conflict between those who want more power given to the federal government, and those who want the most power to rest with the states. Looking at the list below, think about what each category means and what each involves (e.g., environmental protection—species, air, water, and ozone.)

Directions: The following activity will help clarify your position as you begin to participate in our system of federalism. Use the U.S. Constitution, your state constitution, and this worksheet to prepare for the group activity. The following list may include less obvious powers than the ones you brainstormed earlier. Feel free to add others.

GOVERNMENT AUTHORITY/POWER NEEDED TO REGULATE/PROTECT	Government: State, Federal, Shared or No Role	YOUR REASONING
Civil Rights; Equal Rights		
Education/Standards		
Environmental Protection		
Health Care—All Citizens; Health Protection in the Workplace		
Housing, Health Care, Welfare for Poor		
Immigration/Alien Services		
Individual Rights (i.e., Freedom to Choose; Gay Rights)		
Jobs and/or Unemployment		
Land Use (i.e., Soil, Forests)		
Parks and Recreation		
Streets, Roads, Highways		
Unemployment Benefits; Social Security and Medicare		
Weapons, Arms, Militias		
Other		

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Contemporary Trends

The growth of federal government control in the funding and affairs of local and state governments has sparked criticism and calls for a "new federalism" to limit national power. Complex problems, however, defy simple solutions.

The New Federalism: Current Trends in Intergovernmental Relations

Bruce D. McDowell

America has 50 states, 51 constitutions, and 84,955 local governments. All our governments—federal, state, and local—must work together within a complex system of laws to provide public services to all Americans.

Although the distribution of powers between the states and the federal government is spelled out in the U.S. Constitution, the relationships among our many governments have never been completely clear. These intergovernmental relationships have become less clear in recent decades as the federal government has enacted many laws on what state and local governments must do or cannot do.

The "new federalism" now in the news is a product of historic trends that have been creating intergovernmental tensions for a long time. The need to rethink the relationships among governments was great at other times in our history, and we became stronger for the experience.

Before he became president in 1913, Woodrow Wilson said that each generation of Americans needs to confront this issue. Today, we are trying again to adjust our federal system to new realities.

Bruce D. McDowell, AICP, is director of Government Policy Research at the Advisory Commission on Intergovernmental Relations (ACIR) in Washington, D.C.

Some Major Intergovernmental Trends

1. Has government grown too large? Beginning with California's property tax revolt in 1978 (Proposition 13), and continuing through President Ronald Reagan's federal tax cuts of 1981, George Bush's "no new taxes" pledge, and today's call for a balanced federa budget in the Republican party's "Contract with America," the message from the people seems to be that government must reduce its commitments. Total government spending (federal, state, and local) grew from about 10 percent of the nation's economy in 1929 to about 30 percent at the time of California's tax revolt. Now it stands at about 40 percent.

In the face of tax limitations and reluctance to cut federal programs, public debt has risen dramatically. The federal government owes about 81 percent of the nation's $4.9 trillion public debt, requiring 13.7 percent of its budget every year just to pay the interest. In contrast, 49 states and virtually all local governments are required by their own constitutions or laws to balance their budgets every year, except for limited long-term borrowing for public works.

Counting the Governments of Our Federal System, 1932 and 1992

	1932	1992
United States	1	1
States	48	50
Counties	3,062	3,043
Municipalities	16,442	19,279
Towns & Townships	19,978	16,656
School Districts	128,548	14,442
Special Districts	14,572	31,555
Totals	**182,651**	**85,006**

Source: U.S. Bureau of the Census.

There is widespread agreement that the federal government should try to balance its budget. Therefore, it has begun to make public policy based more on deficit reduction than on the nation's public and economic needs, including state and local needs. Some people have called this trend *deficit-driven federalism.* Many states and localities fear that they will have to make up for federal budget cuts by increasing their own budgets and taxes.

2. The federal government has grown more dominant. Of all government revenues collected today, 56 percent is collected by the federal government (including Social Security and Medicare taxes). The 50 states collect about 26 percent, and the 84,955 local governments collect the remaining 18 percent.

But state and local governments actually provide most public services, and they employ 76.4 percent of all public employees, including public school teachers. Thus, state and local governments need financial assistance to meet their intergovernmental responsibilities.

3. Federal influence has shifted from grants to regulation. The federal government's influence over state and local governments traditionally was exercised mostly by federal-aid programs (grants of money), which carried "conditions," namely, rules and regulations. However, since the late 1960s, federal regulations unrelated to financial aid have become more influential. One example is *mandates*, which require state and local governments to do something and pay for it themselves. The first major mandate was enacted by Congress in 1931. Another was enacted in 1940, none was passed from 1941 to 1964, nine were enacted from 1964 to 1969, 25 were enacted in the 1970s, and 27 were enacted in the 1980s.

Another example is federal *preemptions*, which substitute federal policies for state and local policies. Of 439 explicit preemption laws enacted since 1789 by Congress, 233 (53 percent) have been enacted only since 1969.

All these restrictions on state and local governments are made binding by federal laws, agency regulations, and court decisions.

4. Federal spending has shifted from places to people. Federal aid for state and local governments reached a high point in 1978 when it accounted for 27 percent of state and local spending. Aid then dropped to 17 percent of state and local spending by 1989, but climbed again to about 22 percent today.

The most spectacular part of the recent growth in federal spending has been for income security and health care for individuals, plus interest payments on the national debt. Payments made directly to persons by the federal government (such as Social Security checks) now consume 43 percent of the federal budget. In addition, the health and income-security components of federal aid to state and local governments—such as Medicaid and welfare—account for 63 percent of all federal aid.

Together, payments to individuals account for 64 percent of the federal budget. This rapid shift is squeezing out federal funding of state and local governments (places) for such traditional public interest programs as transportation, community and economic development, science and technology, natural resources, and general government.

Medicaid is the largest grant program. It accounts for about 40 percent of all federal grant dollars. The federal government provides states with 50 to 80 percent of the money for health care for the poor. However, Medicaid consumes more than 15 percent of state budgets. In 1990, Medicaid surpassed higher education as the second largest category of state spending. If Medicaid continues to grow, it may soon cut into state spending for elementary and secondary education.

These trends worry state and local governments. During the past three years, many state and local officials have made themselves heard by the Congress and the Clinton administration on federal aid, mandates, and preemption. We will see this debate in the news for many months—perhaps for several years—as intergovernmental relationships are readjusted to new budget realities.

Block Grants

State and local governments believe that federal policies, including cutbacks for deficit reduction, should bring less complexity and fewer federally imposed difficulties. They are requesting fewer, larger, and more flexible grant programs—usually called *block grants*—that would be easier to administer, plus reduced mandates and preemptions.

The U.S. Advisory Commission on Intergovernmental Relations (ACIR) counted 633 grant programs available to state and local governments in 1995. The list includes a few very large programs—such as medical, food, and housing assistance to the poor, welfare payments, and transportation (each worth many billions of dollars)—and a very large number of very small programs, such as renewable energy research, weather research, and the promotion of ports (each worth less than $100 million per year).

President Bill Clinton has proposed consolidating 271 of these grants into 27 "intergovernmental partnerships" for employment and training, housing and urban development, transportation, and health and human services. Congressionally proposed legislation would consolidate more than 300 federal grants into nine block grants for welfare, child protection, child care, employment and training, social services, food and nutrition, housing, health, and law enforcement.

There are many differences among these proposals, and they are being hotly debated because they raise serious intergovernmental issues. For example:

- **Freedom:** *How much choice will state and local governments have in administering block grants?*

Some welfare and health-care proposals introduce strict new requirements, such as rules about future childbearing and abortions. Such requirements would add political and administrative difficulties for state and local governments.

- **Simplification:** *How much simpler will a block grant be to administer?*

Some proposals would keep many complexities from existing programs and rely on difficult coordination mechanisms rather than simple consolidations to get consistent results.

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- **Funding:** *Will the same state and local governments still be funded, and will the money they receive be more or less than what they received under the old programs?*

Funding cuts are a part of most proposals. In particular, some of the health care, welfare, and food proposals would convert programs that now pay for all eligible persons (open-ended entitlements) into programs that would pay for only a certain number (capped), leaving other people without benefits unless state and local governments add funds themselves. Also, many grant consolidations will create winners and losers among the state and local recipients because of the way funds are allocated by new formulas.

- **Accountability:** *Can state and local governments be trusted to make the best use of block grant funds without detailed federal guidance?*

Some people oppose flexible block grants because they believe that state and local governments will not use the money wisely. They will not produce the intended results unless they are given strict guidelines, such as those attached to narrowly defined "categorical" grants that would be consolidated into block grants.

Mandate Relief

Many federal regulations cost state and local governments a lot of money. Each rule also affects different governments differently. For example, a poor rural town with an annual budget of $30,000 will have much more difficulty than a wealthy suburb with a $3 million budget if it must raise $250,000 to pay for federally required wastewater treatment.

Mandates raise difficult political and ethical questions. For instance, most Americans applaud when Congress enacts mandates to protect the environment, provide health care for the poor, and create access for persons with disabilities. But, when Congress does not raise taxes or cut other programs to pay for its mandates, state and local governments must do so. When citizens see their state and local tax bills go up or their services cut to pay for these mandates, they often get angry at their state and local officials, not at Congress.

Mandates force state and local officials to make hard choices avoided by Congress. For example, a large city with 45,000 intersections might have to pay $200 million to install curb cuts for wheelchairs as required by the Americans with Disabilities Act of 1991. The mayor and city council will have to pay the bill, perhaps by raising taxes, borrowing money, delaying road repairs, and/or cutting police and fire services, for example. The city must find money to pay for federal mandates in addition to the traditional services that city residents desire.

In 1993, a coalition of state and local governments was formed to take this issue of federally mandated costs to Congress. The rallying cry was "No money, no mandate!" A bill to provide relief finally passed in March 1995.

The *Unfunded Mandates Reform Act of 1995*

- requires congressional committees to consider and publish the costs that would be imposed on state, local, and tribal governments by proposed legislation and to find federal funding to cover those costs
- allows any member of Congress to stop debate on any proposed mandate that is not funded, unless the member is overruled by a separate vote on the House or Senate floor
- requires the federal agency administering any new mandate to notify Congress if the required funding has not been provided as promised, giving Congress another chance to provide the funding. (If funding is not found, the mandate is not to be enforced.)
- establishes guidelines for federal agency rulemaking to help ensure that new rules create the least possible burden for state and local governments
- requires ACIR to study federal mandates and make recommendations to the president and Congress for reducing their burdens or terminating them.

This law is complex, and it is not certain how well it will work. Many people are more interested in supporting the benefits achieved by mandates than in limiting their costs to state and local governments. Thus, legal contests can be expected in many cases.

Conclusion

The prospect over the next few years is for reduced federal aid to state and local governments. The best these governments can hope for is that federal burdens will be reduced, as well.

However, state and local governments will have to work hard to convince Congress, the president, and the Supreme Court that they need more flexible block grants, greater mandate relief, and fewer preemptions if our federal system is to work more smoothly and more effectively. ●

Resources

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Intergovernmental Relations: The Dynamic Reality of American Federalism

Sarah F. Liebschutz

The county executive of Monroe County, New York, in his introduction to the 1995 county budget, said, "The greatest influence on this budget is the growth of the cost of state and federally mandated programs, particularly Medicaid. The State of New York has provided some relief, but the aid has only slowed their amount and rate, not reduced them."

Yet the county executive did not propose higher property taxes to cover the increased costs. Because the state legislature had given Monroe authority to increase the county sales tax by one cent, additional sales tax revenues were expected to offset the county's increased spending on Medicaid. Unfortunately for counties in the Empire State, New York is only one of 15 states that requires its local governments to share the state's cost of Medicaid.

Although spending decisions and revenue sources differ among America's 84,955 local governments, they are all influenced by decisions of other governments. In turn, other governments are influenced by them. This is because no one government operates alone in our federal system. The federal, state, and local governments are all involved in making policy, financing services, and administering programs.

Federalism is the formal, legal structure within which these governments constantly interact to redefine their roles and responsibilities as social and economic conditions and political expectations change. *Intergovernmental relations* is the term that encompasses those actions and interactions among interdependent units of government. Intergovernmental relations is the dynamic reality of federalism.

Federal, state, and local governments are mutually involved, for example, in making transportation policy; financing highways, bridges, buses, and subways; and administering the programs. The federal-aid highway program, which originated in 1916, was one of the federal government's first intergovernmental grant programs; by 1994, the federal government was providing nearly $20 billion to states for construction, repair, and safety of the nation's 155,000-mile national highway system. State governments are required to supplement these federal grants. Both federal and state governments rely, in large part, on separately imposed motor fuel taxes to pay for these highway programs.

In the 1960s, when Washington began to develop a national urban policy, the federal-state partnership was enlarged to include local governments. Federal mass-transit aid for capital programs and operating systems was initiated. The landmark Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) placed a stronger emphasis on transit (commuter railroads, buses, and subways) and opened the possibility for highway funds to be locally reallocated to transit. ISTEA also strengthened the role of metropolitan planning organizations (MPOs) in determining local transportation priorities and allocating federal, state, and local transportation dollars to meet them.

This interdependence of federal, state, and local governments for transportation policy, funding, and operations means that all three governments can challenge the activities of the others. They are potential adversaries as well as allies in every intergovernmental transaction. Because they are mutually dependent, they conduct the business of resolving their differences by bargaining with each other, not by resorting to dictates.

On the whole, transportation is an example of a largely successful and still generally cooperative intergovernmental program. However, actions by the federal government that hold highway grants hostage if states do not comply with requirements of transportation or other federal programs jeopardize that cooperative spirit. The National Minimum Drinking Age Law of 1984 is an example of legislation with a "crossover sanction." The condition imposed by Congress that states must adopt a minimum drinking age law of 21 in order to receive full federal highway funding was upheld by the Supreme Court in *South Dakota v. Dole* 483 U.S. 203 (1987). Federal highway aid has been tied to compliance with tandem trailer and speed limit laws. When, as seems likely, Congress increases the speed limit to 65 mph, these grants may again be used to "entice" states to comply.

States and local governments use both official and unofficial networks to influence the federal government and each other. Governors, mayors, state legislators, and members of Congress advocate for grant-in-aid formulas that yield the most money for their own state and/or local governments; they also try to minimize the costly effects of federal or state man-

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Sarah F. Liebschutz is Distinguished Service Professor and chair of the Department of Political Science at the State University of New York, Brockport.

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dates. The National Governors' Association, Council of State Governments, National Conference of State Legislatures, National Association of Counties, U.S. Conference of Mayors, National League of Cities, and International City/County Management Association are the "Big 7" leaders of an "intergovernmental lobby" organized to represent state and local government views in Washington, D.C. Their counterparts among cities, towns, villages, counties, and school districts are active in the states. Some officials and organizations are more influential than others. Regardless of outcome or issue, however, the level of activity in the intergovernmental arena is high.

Conclusion

Intergovernmental relations is dynamic because our local, state, and federal governments must respond to ever-changing circumstances and expectations. At the same time, it is subtle because these many mutually dependent governments must compromise with each other through daily bargaining. Decisions reached through bargaining include virtually every facet of domestic and foreign policy—from agriculture, banking, consumer protection, criminal justice, the environment, immigration, taxes, and trade to health, education, and welfare. Intergovernmental relations, indeed, is federalism in action. ◆

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Teaching Strategy

Current Trends in Federalism: An Instructional Guide

John Kincaid and Joseph C. LaRocco

Background

An effective way to help students understand the complex relations between the federal, state, and local governments is to study trends and changes in intergovernmental relations. This lesson will help students become familiar with some current trends and problems in federalism.

Objectives

As a result of this lesson, students will

- Discover recent changes and problems in federalism
- Learn how their school district, locality, and state are affected by changing intergovernmental relations
- Analyze reasons for changes and their positive and negative aspects
- Follow current events in their community and state shaped by federal, state, and local government actions

Procedures

1. Make copies or put the federalism trends on an overhead projector.
2. Choose the best way to give students information about each trend, such as a lecture, readings from this issue of *Update*, or class groups assigned to study one or more trends.
3. Allow students individually or jointly to pick a problem suggested by the trends, review all sides of the issue, and discuss how they are affected by the problem.
4. Have students interview appropriate federal, state, and local officials.
5. Encourage students to keep a file or notebook on an issue for at least two weeks. Have them record federal, state, and local views on the issue.
6. Allow periodic reports to the class on the issue. Do local, state, and federal officials help or hinder each other in solving problems?
7. Ask students to write a brief paper analyzing whether the local, state, and federal officials addressed the problem well. Does our current form of federalism work?

continued on inside back cover

This lesson plan was originally developed from a presentation by guest editor John Kincaid at a 1994 institute on federalism, sponsored by the Center for the Study of Federalism at Temple University in Philadelphia and funded by the National Endowment for the Humanities. Joseph C. LaRocco is a social studies teacher at Cave Spring High School, Roanoke County, Virginia.

Trend 1: Rise and Fall of Federal Aid to State and Local Governments

- Federal aid to state and local governments was $10.2 billion in 1964; $43.4 billion in 1974; $97.6 billion in 1984; and $217.3 billion in 1994.
- Adjusted for inflation, however, federal aid was only $169.6 billion in 1994.
- 1978 was the peak year, when federal aid accounted for 26.5% of state and local budgets and 17.0% of federal government spending.
- Two important federal-aid programs were ended in the 1980s:

  —General Revenue Sharing for states ended in 1980 and for local governments in 1986;

  —Urban Development Action Grants ended in 1988.
- In 1994, federal aid accounted for 22.1% of state and local budgets and 14.6% of federal spending.
- Federal aid is expected to decline in upcoming years because of federal deficit reduction.
- State aid to local governments increased from $36.7 billion in 1972 to $98.7 billion in 1982 to $201.3 billion in 1992.
- In 1972, 57.7% of state aid to local governments was for education; in 1992, 62.1% of state aid was for education.

Activity Questions

Get budgets for your school district, local community, and county for 1995, 1990, 1985, 1980, 1975, and 1970. How much federal and state aid did each government receive each year? What percentage of each budget came from federal and state aid? Has aid risen or fallen over the years? How has rising or falling aid affected public services and local taxes?

Trend 2: Shift of Federal Aid from Places to Persons

- In 1978, only 31.8% of federal aid to state and local governments was for payments to individual persons for programs such as welfare and Medicaid.
- In 1994, 63.3% of federal aid to state and local governments was for payments to individual persons.
- Medicaid now accounts for 40% of all federal aid to state and local governments.
- Because states administer Medicaid and welfare, they now receive 89% of all direct federal aid, while local governments receive only 11%.
- Local governments, including school districts, have seen a steady decline of direct federal aid since 1978. Many local governments now receive no direct federal aid.

Activity Questions

Get budgets for your state for 1995, 1990, 1985, 1980, 1975, and 1970. How much of your state's budget went to Medicaid, Aid to Families with Dependent Children (AFDC), K–12 education, higher education, and prisons in each year? Calculate the rate of increase in spending in each of these areas since 1970. How should your state deal with rising Medicaid costs? Should it raise taxes; cut other services, such as education; or reduce Medicaid benefits for poor people? Interview your state legislator and other state officials to find out what they think about these budget issues.

Trend 3: Increased Conditions Attached to Federal Aid

- Conditions are rules and regulations on how state and local governments can receive and spend federal aid. (States also attach conditions to their aid to local governments.)
- Federal officials argue that conditions are needed to make sure that state and local officials spend federal funds honestly and for things intended by the federal government.
- State and local officials complain that conditions contain too much red tape, restrict flexibility, and often lead to spending on useless or low-priority programs.
- State and local officials also complain that some conditions are devices to expand federal power, such as the 21-year-old drinking age condition enacted in 1984. The Congress has no constitutional authority to enact a drinking age; so, it forced all the states to raise the drinking age to 21 simply by threatening to cut their highway aid by 10% if they did not do so.
- Congress also prefers to condition aid by dividing it up among categorical grants for very specific purposes. The number of categorical grants increased from 392 in 1984 to 578 in 1993 to 618 in 1995. In addition, there were 34 categorical grants for tribal governments in 1995.
- Categorical grants account for about 90% of all federal aid to states and localities.
- A block grant, such as the Community Development Block Grant, combines a number of categorical grants into one broad grant that gives state and local governments more flexibility and discretion in spending federal aid.
- The number of block grants increased from five in 1975 to 12 in 1984 to 15 in 1993 and 1995, plus one additional block grant for tribal governments. The current Congress, however, will likely enact more block grants.

Activity Questions

Get your school district's budget and interview your school district's budget director. How much federal and

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state aid does your school district receive? What conditions come with the aid? What are the positive and negative effects of the conditions?

Trend 4: More Mandates Without Funding

- A mandate is a direct federal order requiring state or local governments to provide certain services or perform certain duties. (States also impose mandates on local governments.)
- Congress enacted one major mandate in 1931, one in 1940, none during 1941–1963, nine from 1964 to 1969, 25 during the 1970s, and 27 in the 1980s.
- There are hundreds more smaller mandates, as well as thousands of pages of mandated rules and regulations issued by federal bureaucracies.
- All federal mandates are enacted with good intentions, but in many cases, state and local governments must pay all the bills to carry out the mandates.
- State and local governments may face stiff fines for failure to comply with mandates. In some cases, state and local officials may risk jail time.
- In March 1995, Congress enacted the Unfunded Mandates Reform Act, which is intended to limit unfunded mandates imposed on states and localities.

Activity Questions

Invite school district, city, and county officials to class to discuss federal and state mandates in your area. Examples might include removing asbestos from schools, installing curb cuts on all major streets, adding wheelchair lifts to buses, and treating wastewater.

Divide the class into two groups. One group will represent local officials who feel that unfunded mandates are unfair. The second group will represent federal or state officials who feel that mandates are needed to make schools and communities safe and accessible. Have both groups find out what it costs to implement particular mandates, such as curb cuts.

From the local officials' view, how are the mandates paid for? Have local taxes been raised or services cut? Is it fair for the federal government to impose mandates without funding them? From the federal officials' view, why shouldn't local governments pay for mandates that benefit their citizens? Would local governments do these things without mandates?

Trend 5: Increased Federal Preemption of State and Local Powers

- *Preemption* means that the federal government displaces state or local authority or laws with a uniform federal law.
- About 439 explicit preemption laws were passed by Congress from 1789 to 1991.
- Some 233, or 53%, of these preemptions were enacted only from 1969 to 1991.
- In *total preemption*, state and local governments must either comply completely with a new federal standard or stop acting in an area now covered by federal law.
- In *partial preemption*, the federal government sets minimum national standards (e.g., many areas of environmental protection), but state or local governments may enact higher standards.

Activity Questions

Divide the class into three groups. Ask each to play the role of a new business that will sell a product or service in different states. Have each group investigate possible regulations that might affect its product or service in your state and surrounding states. For example, should local governments have the power to regulate local cable TV rates? If your state feels that federal laws on product labeling are too weak, should it have the power to require a company to add a new label on all its products sold in your state? Why would a business prefer uniform national regulations covering all states? Why would a state want to keep its own regulations in place?

Trend 6: Increased Federal Court Orders

- Under the supremacy clause and the Fourteenth Amendment, federal judges can order state and local governments to do certain things or stop doing certain things.
- There is no accurate count of all federal court orders, but it is recognized that such orders have increased significantly in recent decades.
- Federal court orders cover such things as school busing, releasing mental patients from state hospitals, locating public housing in certain neighborhoods, ordering states to build new prisons, and requiring schools and state agencies to provide services to undocumented aliens.
- A controversial court order was upheld by the U.S. Supreme Court in *Missouri v. Jenkins*, 110 S.Ct. 1651 (1990). Here, a federal judge had ordered Kansas City and the state of Missouri to spend more than $1 billion to refurbish schools throughout the Kansas City school district.
- During the 1980s, state and local governments lost 61% of the federalism cases decided by the U.S. Supreme Court.

Activity Questions

Ask students to examine *Spallone et al. v. United States*, 109 S.Ct. 14 (1988) and *Spallone v. United States*, 110 S.Ct. 625 (1990). These cases involved public housing in Yonkers, New York. What would happen if a federal court ordered your local government to build public housing in a well-off neighborhood? How would homeown-

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ers, local officials, and the community at large react? What would happen if local officials refused to comply with the order? How much power should a federal judge have to decide such matters?

Ask students to examine school desegregation rulings, such as *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954) and 349 U.S. 294 (1955); *Green v. County School Board*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg School District*, 402 U.S. 1 (1971); *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Armour v. Nix*, 448 U.S. 908 (1980); *Missouri v. Jenkins*, 110 S.Ct. 1651 (1990); and *Freeman v. Pitts*, 112 S.Ct. 1430 (1992). How have the U.S. Supreme Court's views changed over the years? How much power should federal courts have in these areas? How have state and local governments reacted to desegregation orders? Can minorities obtain equal education opportunities without federal court orders?

Trend 7: Decline of Federal Intergovernmental Institutions

- The federal government's ten regional councils were abolished in 1983. These councils had been created to coordinate federal agency services for states and localities in different parts of the country.
- The intergovernmental unit of the president's Office of Management and Budget was eliminated in 1983.
- The U.S. Senate's once-active Subcommittee on Intergovernmental Relations was reorganized into a low-prestige Subcommittee on Government Efficiency, Federalism, and the District of Columbia in 1987.
- The U.S. House's subcommittee was renamed Human Resources and Intergovernmental Relations in 1987 in order to focus more attention on social welfare programs.
- The Intergovernmental policy unit in Congress's General Accounting Office was disbanded by 1993.
- Funding for the U.S. Advisory Commission on Intergovernmental Relations, established by law in 1959, has been cut considerably, and the commission may be eliminated soon.

Activity Questions

Ask students to find out whether your state has a commission on intergovernmental relations or on local government. Have students interview school district, city, county, and state officials who are responsible for intergovernmental relations. What do these officials do, and how do they feel about intergovernmental relations today? What do they see as the main areas of cooperation and conflict? Invite your member of Congress to class to discuss intergovernmental issues in the current Congress. How sensitive is Congress to state and local needs?

Trend 8: Decline of Cooperative Programs

- In efforts to make federal deficits look smaller, the federal government has delayed and reduced payments to the states from trust funds established for cooperative programs involving highways, mass transit, aviation, and state unemployment insurance.
- In 1990, Congress raised the federal gas tax by five cents, but for the first time ever, it did not dedicate the entire increase to highway aid. States view this action as a major violation of the cooperative agreement reached in 1956 to fund highway programs.
- Medicaid was created in 1965 as a program to be funded and run cooperatively by the federal government and the states. Most policy decisions about Medicaid are now made by the federal government alone.

Activity Questions

Get a copy of your state budget or talk with your state highway or transportation department. How much money is spent on highways in your state? How much does it cost to build a mile of road? What percentage of the money comes from state and local taxes and from federal aid? Figure out how much tax (federal and state) is included in the price of a gallon of gasoline. Ask students to figure out how much they spend on gasoline in a year, and what percent goes to highway funding.

Trend 9: Federal Invasions of State and Local Tax Areas

- In 1986, Congress eliminated the ability of individuals to deduct state and local sales taxes from their federal income tax.
- In 1986, Congress also restricted the ability of state and local governments to issue certain types of tax-exempt bonds.
- In 1990, Congress outlawed health-provider taxes levied by states to help finance Medicaid.
- Congress now requires certain state and local government employees to pay federal Social Security taxes—a high cost for big cities and counties.
- A flat federal income tax or national sales tax would have a major impact on state and local finances.

Activity Questions

Ask students to find out how much of your school district's budget comes from local property taxes and tax-exempt bonds. What would happen if Congress eliminated its income tax deductions for property taxes and interest earnings on school bonds? Would this make it easier or more difficult for your school district to raise property taxes and borrow money? Why?

Perspectives on Current Issues

In recent years, both the Congress and the President have sought to reduce federal government control of state and local governments through such measures as the Unfunded Mandates Reform Act of 1995, block grants, and regulatory relief.

From the 104th Congress

Senator Hank Brown

The U.S. Constitution recognizes the principle of "federalism" in the Tenth Amendment. The framers of the Constitution envisioned a nation in which the federal government would have limited powers, leaving a balance between state and federal governing authority. This balance, known as "federalism," has many benefits, including loosely tailored legislative solutions to problems (instead of a federal one-size-fits-all approach), keeping political decisions closer to the people, and benefiting from the best public policies of each of the 50 states.

"Federalism" describes the separate yet integrated authority of state and federal governments to guide the nation's affairs. The two must be distinct, yet remain able to operate with a single national purpose. Unfortunately, over the past 50 years, the reach of the federal government has expanded greatly at the expense of state governments. Indeed, as last year's election indicated, many voters have begun to question the expansive role of the federal government. In effect, they voted to rein it in. The Republican Congress has devoted much of its time to crafting proposals that will replenish and preserve federalism.

Sen. Hank Brown is the senior senator from Colorado. He is Republican. He sits on the Judiciary, Budget, and Foreign Relations Committees. He is also chair of the Subcommittee on Constitution, Federalism, and Property Rights in the Judiciary Committee, which handles many of the issues discussed in this article. Senator Brown spent 10 years in the House of Representatives prior to Senate service. Senator Brown has shown a commitment to federalism and reducing the size of the federal government throughout his public service.

The most important federalism measure is the Unfunded Mandates Reform Act of 1995. This law remedies the inequity of unfunded mandates, which are requirements imposed by the federal government forcing the states to undertake some action and also bear the cost of that action. This law will make it more difficult for the federal government to mandate action without providing the corresponding funds. In the future, Congress will have to put its money where its mouth is—either pay for the cost of the regulations or let the states regulate themselves.

Another popular federalist proposal is the use of block grants. Block grants are lump-sum payments of federal tax dollars, for issues such as crime control and welfare, that are made to the states with fewer or no "strings" attached. States are better situated to make spending decisions because they are closer to the issues. State legislatures will hold hearings, design spending measures, debate the possibilities, and vote on a spending plan after hearing from interested parties and experts in the area. The governor will then approve or veto the final plan. By sending federal tax dollars to the states in the form of block grants, the Republican Congress will strengthen the partnership between state and federal governments as well as allow more flexibility to solve specific problems.

Another measure, which I am sponsoring, helps determine when a federal law should override a state law. Currently, whenever a state law frustrates the purpose of a federal law, the Courts invalidate the state law. I propose to allow the federal law to prevail only when state and federal provisions are in direct conflict. Further, when federal regulations do preempt state law, I would require them to be narrowly tailored to serve their purpose with minimal disturbance to related state laws. Finally, my bill would bring the affected state and local governments into the process of developing the federal rules before they are implemented.

A related measure to limit the scope of the federal government, sponsored by Senator Spencer Abraham of Michigan, would require that the Congress identify, in each bill, its constitutional authority to legislate in that particular area. This requirement would result in more deliberation and

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debate about the proper separation and balance of power between the state and federal governments.

In addition, the Republican-led Congress regularly holds hearings to educate us all about a number of federalism issues, including the Tenth Amendment, the Conference of the States, state sovereignty, block grants, and unfunded mandates.

These Republican efforts are not radical or new. Their corrective theme was anticipated long ago by U.S. Supreme Court Chief Justice John Marshall when he noted in *McCulloch v. Maryland*, 17 U.S. 316 (1819), "The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."

The periodic reevaluation of state and federal power reinvigorates the democratic process from the grassroots to the highest offices of government. With the guidance of federalist principles, this nation is free to reach its full potential by benefiting from the strengths of each state—just as the framers of the Constitution intended.

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From the U.S. Supreme Court

John C. Pittenger

The U.S. Supreme Court has not always found it easy to umpire the boundary between federal and state power. At some points in its history, it has come close to giving up on the job.

In part, this is because textual support for state autonomy in the U.S. Constitution is unclear. The word *federalism* appears nowhere. But the structure of the Constitution makes clear that the framers envisioned a national government of limited (if extremely important) powers, and state governments with wide authority. In fact, the main attack on the Constitution in the state ratifying conventions of 1787–88 came from people who thought that the Constitution created a far too powerful national government, endangering both the autonomy of the states and the liberties of the people.

The Bill of Rights was adopted by the First Congress and quickly ratified by enough states by 1791. One amendment, the Tenth, was included to pacify state fears of an all-powerful national government. But the Supreme Court has vacillated between treating the Tenth Amendment as a genuine bulwark of state authority and as merely "a truism," in the words of Justice Harlan F. Stone.

In addition to the textual problem, federalism concerns have perplexed the Court because the country has changed so radically over the past 207 years. Thirteen colonies, loosely tied together, with a population of three million, have become 50 states, highly interdependent, with a population of more than 260 million. To discern what is properly national and what is properly local under modern conditions is not easy.

Modern federalism law dates back to the late 1930s when the Court approved most New Deal legislation based on congressional power under the interstate commerce clause. Since then, the Court has had to deal with four separate but related federalism issues.

1. *Commerce clause and the Tenth Amendment.* Does the Tenth Amendment limit, in any practical way, the scope of the federal government's commerce power?

This issue has given the Court the most trouble. Take the question of whether the Congress can make the states enforce the Fair Labor Standards Act, governing wages and hours of work, with respect to their own employees. The answer has been "yes" *Maryland v. Wirtz*, 392 U.S. 183 (1967), "no" *National League of Cities v. Usery*, 426 U.S. 833 (1976), and again "yes" *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Although *Garcia* has not been explicitly overruled, recent cases suggest that the pendulum is swinging back toward a more hospitable judicial view of state power under the Tenth Amendment.

2. *Dormant commerce clause.* How far is state power limited by the very existence of the commerce clause, even where the Congress has not acted?

The Court could have ruled that the states may regulate interstate commerce unless and until the Congress acts. But in this century, the Court has examined such state legislation very closely, striking it down where it discriminated against interstate commerce or even where it merely imposed "undue burdens" on interstate commerce. A typical case is *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Here the Court disallowed a New Jersey law forbidding the transport into the Garden State of waste

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John C. Pittenger is former dean of the School of Law at Rutgers—The State University in Camden, New Jersey.

produced outside the state. The Court has been assisted in developing these doctrines by the clear historical evidence that one of the main forces behind the calling of the Constitutional Convention in 1787 was concern about the growth of barriers to free trade among the states.

3. *Preemption.* How far is state power to legislate limited by the fact that the Congress has already acted in the same area?

Preemption is important because it dictates the extent to which states can regulate private economic activity. One branch of the doctrine is clear: if the Congress, acting under one of its enumerated powers, tells the states to "keep out," that is the final word. The Court has worked out theories of "implied preemption" to cover the many situations in which the Congress has not made its intentions clear. The Unfunded Mandates Reform Act of 1995 calls upon the Congress to make its preemptions explicit. But for now, about the only safe generalization one can make about preemption cases is that no generalization can adequately account for all the outcomes.

4. *Conditional spending.* How far can the Congress go in attaching conditions to state receipt of federal money?

This is an important issue because about 22 percent of state budgets comes from the federal government. In general, the Court has held that if the states take money from Washington, they take it with whatever strings the Congress and the President choose to attach.

The most recent case is *South Dakota v. Dole*, 483 U.S. 203 (1987). The Congress told the states they would lose 10 percent of their federal highway money unless they raised the drinking age to 21. South Dakota rebelled. But Chief Justice William Rehnquist, writing for the Court, ruled that even though the Congress might lack the constitutional power to impose such a requirement directly on the states, it could lawfully attach such a condition to federal aid.

Federalism cases are likely to continue to consume much of the Court's time. For example, the recent decision in *United States v. Alfonso Lopez, Jr.*, 115 S.Ct. 1625 (1995) raises interesting questions about the constitutionality of some laws emerging from the present Congress. These issues are likely to find their way onto the Court's docket in the next several years, with consequences of utmost importance to all Americans. ◆

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(by date of enactment and purposes)

	Banking & Finance	Civil Rights	Commerce	Health & Safety	Natural Resources	Tax	Other	Total
Before 1900	0	7	15	4	1	3	0	30
1900–1909	0	0	7	5	2	0	0	14
1910–1919	1	0	16	3	1	0	1	22
1920–1929	2	0	12	3	0	0	0	17
1930–1939	8	0	21	2	0	2	0	33
1940–1949	1	0	9	3	2	0	1	16
1950–1959	3	1	10	6	3	2	2	27
1960–1969	5	7	9	23	3	0	0	47
1970–1979	15	10	31	32	9	6	5	108
1980–1989	13	6	35	26	6	5	9	100
1990–1991	2	2	11	6	0	3	1	25
Totals	**50**	**33**	**176**	**113**	**27**	**21**	**19**	**439**

Source: U.S. Advisory Commission on Intergovernmental Relations, Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues. September 1992.

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From the White House

Joseph R. Marbach

In recent years, there have been a number of proposals to alter the relationship between the states and the federal government. The two proposals described here share a dissatisfaction for the way in which federalism is being practiced in the United States. The first seeks to "revive the American dream"; the second attempts to "reinvent government."

Reviving the Dream

Before joining the Clinton administration as Director of the Office of Management and Budget, economist Alice M. Rivlin wrote *Reviving the American Dream: The Economy, the States and the Federal Government.* This book examines the impact of contemporary American federalism on our way of life and our public institutions. Essentially, Rivlin believes that a sorting out of the functions performed by the federal and state governments is needed to energize our economy. She suggests four major changes in intergovernmental relations to achieve this goal.

The first change calls for the federal government to control the growing costs of health care and to guarantee health-care insurance for everyone in the U.S. These reforms are necessary because Americans are spending more resources on health care (as measured by percentage of Gross National Product) than any other advanced industrialized nation. Consequently, money that could be invested more productively is being diverted to health costs. Second, according to the author, "about 33 million Americans...had no health insurance at all in 1989." By instituting a system of national health insurance that would slow the growth of costs and provide universal coverage, argues Rivlin, we will meet our economy's need for a healthy labor force.

The second change calls for the federal government to erase its budget deficit and to create a surplus. This change would reduce the federal debt and increase the amount of money available for investment in the private sector. Investors would no longer be able to buy so many tax-free and risk-free U.S. government bonds, and massive federal borrowing would no longer drive up interest rates.

The third change calls for the states to take over what Rivlin calls the *productivity agenda.* This involves education and job training and upgrading the nation's infrastructure. The federal government would give up its involvement in these areas, as well as in housing, social services, and economic development. This proposal of "dividing the job" would allow the federal government to reduce its deficit and also to focus more competently on international relations and managing the economy in an era of increased global interdependence.

The final change would enable the states to pay for the programs dropped by the federal government. This change calls for the states to share common revenues, such as a nationwide sales tax, a value added tax, corporate income taxes, and even a gasoline tax. This concept of the states sharing common taxes has never been practiced in the United States. Instead, the citizens of each state determine which types of taxes are most appropriate for their situation. Rivlin argues that shared taxes would eliminate economic competition between the states, produce the uniform conditions that business likes, and increase overall state revenues.

Taken together, Rivlin believes these proposals would not only improve our system of federalism, but also revitalize our economy. These proposals are controversial, however, and have not been adopted by the states or the federal government.

Reinventing Government

The Clinton administration, under the supervision of Vice President Al Gore, has initiated a major review of how the federal government operates. It is called the *National Performance Review* (NPR). One subject examined by NPR is the relationship between the federal, state, local, and tribal governments. This federalism component of NPR is outlined in its report entitled *Strengthening the Partnership in Intergovernmental Service Delivery.*

The first recommendation calls on the president to issue an executive order to limit the number of unfunded mandates imposed by federal agencies on state, local, and tribal governments. Mandates are requirements that one government forces another to meet, such as the federal requirement that public agencies make their buildings handicapped accessible. Mandates, especially unfunded ones, have become a major source of conflict between the federal, state, local, and tribal governments. In 1993, President Clinton issued Executive Orders 12866, "Regulatory Planning and Review," and 12875, "Enhancing the Intergovernmental Partnership." These orders require federal agencies to refrain from imposing unnecessary costs on states and localities. Agencies also have more freedom to grant waivers or exceptions to states and

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Joseph R. Marbach is an assistant professor of political science at Seton Hall University in South Orange, New Jersey.

localities so that they can initiate experimental and innovative activities.

A second major recommendation calls for creating flexible and innovative approaches to solving the problem of federal grant proliferation and red tape. This recommendation emphasizes a "bottom up" approach in which states and localities would work with federal agencies to consolidate some of the federal government's 633 grant programs into broader, more flexible, and more coordinated grants. NPR notes, for example, that there are more than 140 federal programs to assist children and their families. Funding for these 140 programs is handled by ten federal departments and two independent agencies. A related recommendation urges federal agencies to give state and local officials greater flexibility in utilizing the grants they receive to meet the unique problems they face.

Other NPR recommendations include simplifying the way states and localities are reimbursed for administering federal programs, and the way in which federal agencies certify that a state, local, or tribal government is complying with the rules attached to the grants. Another recommendation calls for the reinvigoration of the U.S. Advisory Commission on Intergovernmental Relations (ACIR). This agency brings together federal, state, and local officials to consider common problems and to recommend ways to address them.

The Clinton administration has taken a number of steps to implement these recommendations. However, in our system of separated powers, there is a limit to what a president can do alone. Real reforms of our federal system will also require concerted action by the Congress and the federal courts.

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Where Should Power Be Concentrated?

In the federal government	26%
In the state government	64%

Source: "The Dimming American Dream," State Legislatures, *July/August, 1995. Poll of 1,003 adult Americans conducted by Hart and Teeter.*

From the Hall of the States

James L. Martin

Federalism covers a broad and deep range of governance issues as well as specific policy concerns.

Federalism embraces basic constitutional issues, such as Article V of the U.S. Constitution, on how to call a constitutional convention, and the Tenth Amendment, which reserves to the states or to the people all powers not delegated to the federal government.

Federalism also includes specific legislative actions, such as balanced budgets, mandates and regulations, block grants, who pays for what (federal, state, or local taxpayers), formulas for distributing federal funds, preemption of states' laws, and tax policies.

States are concerned about the broad and the specific aspects of federalism. We will focus on issues that affect states immediately. These include a strong and growing national economy, reducing the rapid growth of Medicaid and Medicare costs (a total of $332 billion in 1996), welfare reform, the design and implementation of new block grants, and tax reforms that could dramatically reshape federalism for years to come.

Sustained national economic growth is the leading federalism concern of state governments. Combined state and local revenues in 1992 amounted to $1.2 trillion. This was nearly equal to the $1.3 trillion taken in by the federal government that same year. All federal aid to state and local governments was only $179 billion in 1992.

If the national economy dips, state revenues dip too. But, when the national economy drops, state costs go up for many kinds of welfare and job-assistance programs. The great train of job creation, consumer spending, and new revenues for government services is pulled forward by sustained eco-

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James L. Martin is the director of the Office of State-Federal Relations of the National Governors' Association in Washington, D.C.

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Choosing America's Judges
Candice Goldstein, 12.2/S'88

Courthouses as Learning Laboratories
Robert Clayman and Lynn Sygiel, 11.2/S'87 (St: Sec)

Do Cameras in the Courtroom Hurt the Cause of Justice?
Audrey Pinkham Benson, 8.2/S'84

Foundations of Judicial Review
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How I'd Run the Courts... If I Were Dictator
George H. Williams, 6.1/W'82

Humpty Dumpty's Assault
Sally Jensen-Ricciotti, 14.1/W'90 (St: Mid)

Judicial Review—How Judges Decide
Our Living Legacy Project, 14.1/W'90

The Least Dangerous Branch?
Joseph L. Daly, 10.3/F'86

People Power in the Courts
Julie Van Camp, 6.1/W'82 (St: Gen)

People Who Make Courts Work
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The Supreme Court
Connie Yeaton and Karen Braeckel, 11.3/F'87

Tailoring the Sentence to Fit the Criminal
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Too Much Law?
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What Is the Judicial Branch?
Center for Civic Education, 13.3/F'89 (St: K-6)

When Is a Sentence Fair?
Jay Casper, 8.2/S'84

Will the Court Hear This Case?
Law in a Changing Society, 11.3/F'87 (St: Sec)

Curriculum Update

Focus on Audio-Visual Materials
Joanna Banthin and Susan E. Davison, 1.1/S'77

A Grab-Bag of Goodies
Mabel C. McKinney-Browning, 6.3/F'82

Help Is on the Way
Mabel C. McKinney-Browning, 4.2/S'80

Materials Aplenty for 1979
Charlotte C. Anderson and Lisa Broido, 3.1/W'79

Materials to Help You Plan Ahead
Diane Farwick and Faye Terrell-Perkins, 8.2/S'84

Materials to Kick-off the New School Year
Charlotte C. Anderson and Kathy Kosnoff Erlinder, 2.3/F'78

New Materials for the New School Year
Diane Farwick and Faye E. Terrell-Perkins, 10.3/F'86

New Materials for the New Year
Mabel C. McKinney-Browning, 7.1/W'83

New Materials for You
Mabel C. McKinney-Browning, 6.1/W'82

New Materials on the Market
Lisa Broido, 3.3/F'79

Picking the Right Ones
Diane Farwick and Faye E. Terrell-Perkins, 9.2/S'85

A Potpourri of Materials
C. C. Anderson, K. K. Erlinder, and B. A. Pearson, 2.2/S'78

The Rite of Autumn: Women's Rights, Gay Rights, Prisoners Rights...
R. A. Davis, D. Farwick, and F. Terrell-Perkins, 7.3/F'83

Death Penalty

Bizarre Murder Case Resparks Controversy Over Death Sentence
Rosemary Kassekert and Joseph L. Daly, 8.2/S'84

The Death Penalty
Mark Crockett, 14.1/W'90 (St: Sec)

Death Penalty for Juveniles Is Limited
Denis J. Hauptly and David A. Sellers, 13.1/W'89

Death Penalty for Minors and the Mentally Retarded Upheld
Linda Bruin, 13.3/F'89

"Victim Impact" Evidence and the Significance of Precedent
Paul B. Herbert, 15.3/F'91

Democracy

Crumbling Walls, Enduring Obstacles
Daniel Jay Baum, 14.3/F'90

Democracy and Rights
Linda R. Monk, 14.3/F'90 (St: Sec)

Prospects for Democracy in the People's Republic of China
James V. Feinerman, 14.3/F'90

What Is a Democracy?
Phyllis Maxey Fernlund, 14.3/F'90 (St: Mid)

Will Democracy Come to South Africa?
N. Brian Winchester, 14.3/F'90

Disability Legislation

Disability Legislation and Civil Rights: Contemporary Issues and Historical Background
Wanda J. Routier, Aggie Alvez, and Jeffrey Chinn, 17.2/SS'93 (St: Sec)

Diversity (See also "Equality/Racial Justice")

Amendment 28: Protecting Diversity
Gayle Mertz, 19.1/W'95

Conflict, Violence, and Cultural Diversity
T. A. Regulus and K. Leonaitis, 19.1/W'95

Cumulative Voting: A Controversy
Gayle Mertz, 19.1/W'95 (St: Sec)

Developing a Class Proposal on Diversity
Lorenca Rosal, 16.2/SS'92 (St: Mid, Sec)

Divided We Stand?
Joe O'Brien, 19.1/W'95

E Pluribus Unum: Diverse Ideas from a Native American Perspective
Richard A. Monette, 19.1/W'95

Focus on Tolerance
Marilyn R. Cover, 19.1/W'95 (St: Sec)

Freedom and Tolerance
Arlene F. Gallagher, 15.2/SS'91 (St: K-6)

Drugs

Assessing Public Opinion (About Drugs): Views You Can Use
Constitutional Rights Foundation, 13.2/S'89 (St: Mid, Sec)

California v. Greenwood Moot Court Simulation
Diana Hess, 13.3/F'89 (St: Sec)

Case Study: Parents, Drugs, and Neglect
Edward L. O'Brien and Richard L. Roe, 13.2/S'89 (St: Sec)

Conduct and Actions (Drug Searches)
Phi Alpha Delta Law Fraternity, 13.2/S'89 (St: Sec)

Court Considers Drug Courier Profiles
Denis Hauptly and David A. Sellers, 13.3/F'89

Court Upholds Drug Tests
Charles White, 13.2/S'89

Drug Testing: Is It Constitutional?
Connie Hankins, 13.2/S'89 (St: Sec)

Garbage at the Curb: No Fourth Amendment Protection
Steven J. Uhlfelder, 12.3/F'88

High in the Sky
Denis Hauptly and David A. Sellers, 13.2/S'89

The History of American Drug Control
D. F. Musto, 13.2/S'89

"Honest Mistakes" and the Exclusionary Rule
David Morris and John Sullivan, 13.2/S'89 (St: Sec)

Is Drug Testing Constitutional?
James Phillips, 13.2/S'89

An Ounce of Prevention
Suzanne Bolton, 12.2/S'88 (St: K-6, Mid)

Planning to Solve a School Drug Program
Center for Civic Education, 13.2/S'89 (St: Mid)

Should Drugs Be Legalized?
Yes–William Chambliss; No–Thomas Scorza, 13.2/S'89

Understanding Drugs
Wichita Police-School Liaison Program, 13.2/S'89 (St: K-6)

What Does the Law Really Say (About Drugs)?
Legal Education for Youth Program, 13.2/S'89 (St: K-6)

Why We Must Win the War Against Drugs
Hon. Reggie B. Walton, 14.1/W'90

Due Process

Battle for the Truth
State Bar of Texas, 12.1/W'88 (St: Gen)

Can the Bill of Rights Survive the Crisis in Criminal Justice?
Samuel Dash, 14.1/W'90

The Court and the Cops
James J. Fyfe, 5.1/W'81

Court Considers Drug Courier Profiles
Denis Hauptly and David A. Sellers, 13.3/F'89

Criminal Law Mock Trial
Jennifer Bloom, 10.1/W'86 (St: Mid, Sec)

Discipline and Due Process in the Schools
David Schimmel and Louis Fischer, 1.2/F'77

Does Conscience Matter More than Law?
Sharon Irish, 5.1/W'81

Does the Constitution Protect Your Right to Fair Play?
Center for Civic Education, 13.3/F'89 (St: K-6)

Dramatization of Salem Witch Trial (Upper Elem.)
Elizabeth Chorak, 12.1/W'88 (St: K-6)

Due Process: What Is It?
Patricia McGuire, 5.1/W'81 (St: Gen)

Elementary Mock Trial
Jennifer Bloom, 10.1/W'86 (St: K-6)

Equality—The Forgotten Word
Joyce A. Hughes, 10.2/S'86

Except When Due Process Is Done In... (Political Trials)
Charles White, 6.1/W'82

Extending the Boundaries of Liberty
William L. Robinson, 15.3/F'91

Free Jury Simulation
Joseph O'Brien, 10.1/W'86 (St: Sec)

Great Constitutional Ideas: Justice, Equality, and Property
Isidore Starr, 11.2/S'87

Harmless Errors and Coerced Confessions
Sarah N. Welling, 15.2/SS'91

"Hell, We Couldn't Agree On Lunch" (Chicago Seven Trial)
Charles White, 5.3/F'81

How I'd Run the Courts. . . If I Were Dictator
George H. Williams, 6.1/W'82

The Idea of Justice
Julius Chambers, 11.2/S'87

Justice and Due Process (Resources)
Mabel C. McKinney-Browning, 5.1/W'81

Justice Without Judges
Albie Davis, 8.3/F'84

The Law in United States History: A Kaleidoscopic View
Isidore Starr, 17.2/SS'93

Lawyers and the Quest for Justice
Isidore Starr, 12.1/W'88

Legal Literacy for Laypeople
Susan Filichio, 12.1/W'88

Making Government Fair
George Galland, 10.2/S'86

Making Wrongs Right
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Mediation and the Adversary Process
Melinda Smith, 10.1/W'86 (St: Mid)

Mini Mock Trials
Jennifer Bloom, 10.1/W'86 (St: K-6)

Right to Counsel
Alan L. Lockwood and David E. Harris, 10.1/W'86 (St: Sec)

The Right to Counsel: An Historical Overview
William G. Priest, 17.1/W'93 (St: Sec)

Seeking Facts to Solve Mysteries
Dale Greenawald, 10.1/W'86 (St: K-6)

Sentencing Guidelines Upheld
Denis J. Hauptly and David A. Sellers, 13.2/S'89

Teaching About Habeas Corpus
Richard L. Roe, 10.1/W'86 (St: Mid)

There Is an Alternative to the Adversary System
Charles White, 4.3/F'80

Unsnarling Legal Tangles
Frank J. Kopecky and Rebecca S. Wilkin, 4.3/F'80

Voir Dire Simulation
Julie Van Camp, 10.3/F'86 (St: Mid)

"We the Children"?
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What Is Justice?
Law in a Free Society, 11.2/S'87 (St: Sec)

What Is Procedural Justice?
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Wheeling and Dealing Justice
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When a Trial Becomes a Political Circus
Charles White, 5.1/W'81

When Law Becomes a Political Football (Political Trials)
Charles White, 5.2/S'81

When Tortured Children Strike Back
Barry Siegel, 7.3/F'83

Why I Went to Small Claims Court
Charles White, 1.2/F'77

Widening the Scope of Due Process
Victor Rosenblum, 5.1/W'81

Employment/Jobs

Court Upholds Ban on Sex Discrimination
Dale L. Brodsky, 15.2/SS'91

Decisions and Revisions (Aliens and the Law)
Barbara Kate Repa, 8.3/F'84

Jobs
Elisabeth Dreyfuss and Richard D. Ellmers, 4.1/W'80

Minority Inclusion Programs
M. David Gelfand, 19.1/W'95

Sexual Harassment in Schools
Ralph D. Mawdsley, 18.2/S'94

Your Rights on the Job
Dale Greenawald and Tom Roberts, 12.1/W'88 (St: Sec)

Entrapment

Does Entrapment Decision Set New Rule or Affirm Settled Law?
Alan Raphael, 16.2/SS'92

Environment/Ecology

The American Future: Sustainable or Not!
Stanley R. Euston, 17.3/F'93

Hey Kid! Don't Let Go of That Balloon!
David J. W. Vanderhoof, 17.3/F'93 (St: Sec)

Minamata and Love Canal: A Pollution Tale of Two Cities
Mary Louise Williams, 17.3/F'93 (St: Sec)

Once Upon a Future Time: Thoughts on the Global Environment and LRE
Mary Louise Williams, 17.3/F'93

The Seventh Generation: A Mock Hearing
Gayle Mertz, 17.3/F'93 (St: Sec)

The Story of the Southern Sea Otter
Margaret W. Owings, 17.3/F'93

Walls, Sovereignty and Nature: Ecological Security in an Interdependent World
Veronica Focseneanu, 17.3/F'93

What Citizens Can Do: A Case Study in Environmental Activism
Nancy Bartlit, John Bartlit, and Michael Williams, 17.3/F'93

Equality/Racial Justice

Affirmative Action
James Giese and Barbara Miller, 11.2/S'87 (St: Sec)

Beyond Racial Discrimination
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Brown v. Board of Education—A Pictorial History of Public School Desegregation
Margaret Bush Wilson, 18.2/S'94

Children's Books and Minorities: Focus on the Black Experience
Arlene F. Gallagher, 12.3/F'88 (St: K-6)

The Civil Rights Amendments
Cleveland Public Schools, 11.3/F'87 (St: K-6)

Civil Rights and the Burden of Proof
Daniel Jan Baum, 14.1/W'90

Civil Rights in the 19th and 20th Centuries
Mary Louise Williams, 12.3/F'88 (St: Sec)

The Constitution: Justice for All?
Linda R. Monk and Marcia A. Thompson, 17.1/W'93 (St: Sec)

Core Figures in Black History
Claire Conway, 12.3/F'88

Court Clarifies Methods for Proving Employment Discrimination
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The Court Grapples With Equal Protection
Norman Gross, Cynthia A. Kelly, and Charles White, 1.1/S'77

Death Row Lawyers
Claire Conway, 13.1/W'89

Different Treatment for Different Folks?
David T. Naylor, 15.3/F'91 (St: Mid)

The Dilemmas of Equality
Michael Middleton, 11.2/S'87

Discrimination and the Law
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The Dislike of the Unlike
Carlos Cortés and Van Perkins, 4.3/F'80

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Equal and Equitable: What's the Difference?
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Equality Before the Law: The Civil War Amendments
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Equality: Changing the Rules of the Game
Carolyn Jefferson, 12.3/F'88 (St: Mid, Sec)

Equality—The Forgotten Word
Joyce A. Hughes, 10.2/S'86

Equality Under Law
Isidore Starr, 12.3/F'88 (St: Sec)

Equal Justice 30 Years After Gideon
An Update Interview With Earl Johnson, Jr., 17.1/W'93

Equal Protection and Sexual Orientation
Jean Dubofsky, 19.1/W'95

Equal Protection and Trial by Jury
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The Evolving Constitution
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Exploring U.S. v. Hirabayashi
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Extending Understanding of Equal Protection Strategy
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A Famous Kansas Child
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Fannie Lou Hamer and the Fourteenth Amendment
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Hispanics! Immigration! Reform?
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The Idea of Justice
Julius Chambers, 11.2/S'87

The Impact of the Civil Rights Movement on the Women's Movement
Karen O'Connor, 12.3/F'88

Indians and the Law
Ronald F. Cold, 12.3/F'88 (St: Sec)

Indians in United States Civil Rights History
W. Richard West, Jr., and Kevin Glover, 12.3/F'88

The Law in United States History: A Kaleidoscopic View
Isidore Starr, 17.2/SS'93

The Legacy of Racial Discrimination: Who Pays the Cost?
Derrick Bell, 12.3/F'88

A Luxury We Can't Afford
Alan Lockwood and David Harris, 14.2/S'90 (St: Sec)

A Minority Agenda
Walter M. Perkins, 4.1/W'80

Minority Agenda for the '80s: Part II
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A Plea for Equality
Cynthia A. Kelly, 1.1/S'77

Prejudice and Equality
Arlene F. Gallagher, 15.3/F'91 (St: K-6)

Protest, Politics and Litigation
Frank R. Parker, 12.3/F'88

Race and the Constitution in the Nineteenth Century
John Hope Franklin, 12.3/F'88

Race, Equality and the Fourteenth Amendment
Michael A. Middleton, 15.3/F'91

Resources
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Salute to the National Equal Justice Library
Harriet Wilson Ellis, 18.3/F'94

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Searching for Equality
James Giese and Barbara Miller, 11.2/S'87 (St. Mid)

Ships in the Night: American Law and the Latino Community
Daniel Ramirez, 16.2/SS'92

Slavery, the Constitution, and the Founding Fathers
Mary Frances Berry, 12.3/F'88

South Africa: The Last Plantation
N. Brian Winchester, 4.3/F'80

The Struggle for Equality
Mary Louise Williams, 15.3/F'91 (St. Sec)

Terra Firma (Indian Rights)
Educating for Citizenship, 12.3/F'88 (St. Mid)

25 Years of Controversy (School Desegregation)
Ivan Gluckman, 3.3/F'79

Tyranny of the Majority
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Voting Rights: Key to Equal Rights?
Mary Louise Williams, 12.3/F'88 (St. Sec)

Working Toward Justice in Diversity
Constitutional Rights Foundation Chicago, 16.2/SS'92 (St. Mid)

"You Must Desegregate!"
Walter M. Perkins, 3.3/F'79

Ethics

Codes of Ethics
Alberta Education Curriculum, 14.2/S'90 (St. Mid)

The "Debbie" Affair
Howard Wolinsky and Tom Brune, 14.2/S'90

Ethics in Government
Center for Civic Education, 14.2/S'90 (St. Sec)

Learning Ethics in School-Based Mediation Programs
Elisabeth Travis Dreyfuss, 14.2/S'90

A Lesson in Legal Ethics
Margaret Reilley and Susan Neisuler, 14.2/S'90 (St. Sec)

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Making Decisions
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Some Basic Definitions
Alberta Education Curriculum, 14.2/S'90 (St. Mid)

Values in Decline
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Family Law (See also "Juvenile Justice.")

Cases on... Animals and Accidents
Will Bernard, 1.1/S'77

Cases on the Parent-Child Relationship
Will Bernard, 1.2/F'77

Case Study: Parents, Drugs, and Neglect
Edward L. O'Brien and Richard L. Roe, 13.2/S'89 (St. Sec)

Child Abuse: The Crime No One Wants to Talk About
Beverly Cole, 6.2/S'82

Children as Victims
Arlene F. Gallagher, 12.2/S'88 (St. K-6)

Confronting Child Abuse
Howard A. Davidson, 12.2/S'88

The Debate Over Sex Education
Louise Koegi, 5.2/S'81

Do Kids Have Rights at Home?
Teri Engler and Susan Sussman, 5.2/S'81

"I Do"(How to Teach Your Students About Marriage and Divorce)
Ed O'Brien, 5.2/S'81 (St. Gen)

Marriage in India: Law and Custom
Joan L. Erdman, 5.2/S'81

Materials on Law and the Family
Mabel C. McKinney-Browning, 5.2/S'81

Parents, Children, Government: Sharing the Constitution Is Not Easy
Diane Geraghty, 5.2/S'81

Should the Family Protection Act Be Passed?
Yes–Charles E. Rice, No–Peter R. Bonavich, 5.2/S'81

Who Gets the Kids When Mom and Dad Call It Quits?
Teri Engler and Julie Gorman, 5.2/S'81

Whose Job Is It to Protect Abused Children When Parents Won't?
Jim Fine, 13.3/F'89

Federalism

Beyond the Bill of Rights
Charles White, 11.1/W'87

Comparing State and Federal Constitutions
Lucinda J. Peach, 10.2/S'86 (St. Sec)

Federalism Lives
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Federal/State Relations: 55 MPH Speed Limit
Margaret Fisher, 11.3/F'87 (St. Sec)

The Tides of Power
Joseph L. Daly, 10.3/F'86 (St. Sec)

What Does the Constitution Say About Federalism?
Project '87, 11.3/F'87 (St. Sec)

When the Constitution Isn't Enough
Robert S. Peck, 10.2/S'86

Fifth Amendment (See "Due Process.")

First Amendment (See "Freedom of Religion," "Freedom of Speech," "Freedom of Press.")

Fourth Amendment (See "Search and Seizure.")

Freedom of Association

Come to the First Amendment Fair
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Do Private Clubs Have a Right to Exclude? Maybe, and Maybe Not
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Freedom of Press

The All-Seeing Eye of the Media
Gary W. Kubek, 6.2/S'82

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Connie Yeaton and Karen Braechel, 11.1/W'87 (St. K-6)

Court Finds "Actual Malice" in Libel Case
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The Curious Case of the Student Press
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Down with Tyranny (John Peter Zenger's Trial)
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The Emerging Student Press
Christopher Fager, 2.1/W'78

First Amendment Foils Falwell
Steven J. Uhlfelder, 12.3/F'88

Freedom of Press on Trial
Alfred T. Goodwin and Lynn Taylor, 2.1/W'78

Free Press v. Fair Trial in Japan
John E. Walsh, 2.1/W'78

Frontier "Justice" Versus the Rule of Law
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Has the Pen of the Press Been Turned into a Weapon?
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Hazelwood One Year Later
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Individual Rights: Freedom of the Press
Dorothie C. Shah, 13.2/S'89 (St. Sec)

Introducing the First Amendment
Donna Sorenson, 11.1/W'87 (St. Mid)

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My Both Sides Win
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New Life in Times of Strife? (Free Speech in Wartime)
Melinda Smith, Ken Rodriguez, and Mary Louis Williams, 8.1/W'84

No Liability for Identifying a Rape Victim This Time
Jack C. Doppelt, 13.3/F'89

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D. T. Naylor and B. D. Smith, 6.2/S'82 (St. Gen)

Putting a Lid on Dissent
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Shield Laws Must Comply with Sixth Amendment
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Should the Press Ever Be Limited?
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The Struggle for a Free Press
Cynthia A. Kelly, 2.1/W'78

Three First Amendment Cases
Richard L. Roe, Peter delacy, and Naomi Cahn, 9.3/F'85

To Protect or Not to Protect—That Is the Question!
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The Universal Urge to Censor
Judith Krug, 9.3/F'85

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Christian Yellow Pages Under Fire
Lisa Broido, 3.1/W'79

Christmas Creche Crisis
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Linda Bruin, 13.3/F'89

The Crusade Against Polygamy
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First Amendment Cases Top Court Term
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Freedom of Religion and the Public Schools
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From Consensus to Confusion: Should the Wall of Separation Be Demolished or Rebuilt?
David Schimmel, 18.2/S'94

Frontier "Justice" Versus the Rule of Law
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Going Beyond Darwin
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My Pilgrimage to the Wall of Separation...
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The Nature of Religious Freedom
David T. Naylor, 15.2/SS'91 (St. Mid)

Protecting Native American Religious Freedom
Lisa D. Harjo, 19.1/W'95 (St. Sec)

Religion and Crime Head the High Court's Decision List
Robert L. Hayman, Jr., and Jeannett P. Gringo, 9.3/F'85

Religion and the Law in the Middle East
John E. Walsh, 3.1/W'79

Religious Clubs May Meet at Public Schools
Linda Bruin, 14.3/F'90

The Religious Guarantees
National Archives, 11 1/W'87 (St. Sec)

Religious Liberty as American History
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Sectual Discrimination?
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Should Churches Be Taxed?
Yes–Steven Delibert, No–Dean M. Kelley, 3.1/W'79

Teetering on the Wall of Separation
Isidore Starr, 3 1/W'79

"We the Children"?
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Freedom of Speech

Are There Limits to Symbolic Speech?
Steve Jenkins, 14 1/W'90

Attorney Ads Protected
Linda Bruin, 13 1/W'89

Balancing Power and Liberty in the School
Kenneth A. Sprang, 11 1/W'87 (St. Sec)

The Bill of Rights
Connie Yeaton and Karen Braechel, 11 1/W'87 (St. K-6)

Carving Exceptions Out of the First Amendment
Franklyn S. Haiman, 4 2/S'80

The Case for the Case Study Approach (Tinker Case)
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Come to the First Amendment Fair
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The State and Local Legal Center

In 1983, seven national organizations of state and local government officials founded the State and Local Legal Center in order to establish an effective presence in the U.S. Supreme Court to protect the interests of the citizens they represent.

The seven organizations that remain responsible for the Center's governance are the National Governors' Association, National Conference of State Legislatures, Council of State Governments, National Association of Counties, National League of Cities, United States Conference of Mayors, and International City/County Management Association.

Governors, mayors, state and local government legislators, and other state and local officials thought it essential to advance and defend their interests before the judicial branch, as well as the executive and legislative branches of our federal system. Issues critical to state and local governments concerning federal preemption, state and local regulatory authority, and taxation were being decided by the Supreme Court. The founders of the Legal Center decided to provide a means for state and local governments, acting together, to offer the Supreme Court a wider perspective than a single city, county, or state could provide, to enhance the Court's understanding of their problems, and to assist individual state and local governments with their advocacy in the Court.

Each year numerous state and local governments are directly assisted by the Legal Center with an *amicus* brief or a moot court. Although no city or state expects to be involved in a Supreme Court case, litigation may nonetheless make its way to the Supreme Court. In that event, the Legal Center is there to provide assistance through an *amicus* brief or a moot court. For example, through its *amicus* brief, the Legal Center helped persuade the Court to sustain California's tax apportionment method for multinational corporations in *Barclays Bank PLC v. California Franchise Tax Board.* The Legal Center similarly helped convince the Court to uphold Oregon's system of tax exemptions and its ability to tax railroads in *Department of Revenue of Oregon v. ACF Industries, Inc.* The Legal Center has likewise supported local governments with *amicus* briefs in cases such as *City of Richmond v. J.A. Croson Co., Northwest Airlines v. County of Kent, Michigan,* and *Yee v. City of Escondido.*

The Legal Center's assistance in those cases was invaluable to all states, counties, and cities. State and local governments benefit by having the Legal Center monitoring the Court, ready to help make the best case for federalism by defending the authority and responsibility vested by our Constitution in elected state, county, and city officials. State and Local Legal Center, 444 North Capitol Street, NW, Suite 345, Washington, DC 20001, FAX (202) 434-4851.

nomic growth. U.S. leadership in a competitive, worldwide marketplace directly affects job growth, state revenues, and, eventually, state-federal relationships.

Medicaid is the second major federalism concern of state officials. Medicaid was created in 1965. It is an intergovernmental program funded by the federal government and the state governments to provide health care for the nation's poor. Medicaid represents 40 percent of all federal aid to all state and local governments for all purposes. Today, there are about 628 separate, categorical aid programs for state and local governments. For example, there are 150 categorical grants for job training; 77 for elementary, secondary, and vocational education; and more than 200 for various welfare programs.

Medicaid costs and rules outweigh state concerns about all these other programs combined. In 1995, the federal government paid $92 billion into Medicaid, but this required a $62 billion (or 40 percent) match paid by state governments. Medicaid's cost is growing by 10.3 percent per year; our economy is growing at less than 3 percent a year. Unless costs for Medicaid ($154 billion) and Medicare ($178 billion)—which is federally funded health care for senior citizens—are controlled soon, all other functions and services of government will be reduced.

Health-care costs are concentrated on the elderly. Fully 100 percent of Medicare's funds and 69 percent of Medicaid's dollars go to the aged, blind, or disabled, not to welfare mothers and their children. The elderly are perhaps the strongest voting block in America; so controlling costs for their programs is the most difficult domestic political issue facing the nation and federalism. Solutions include:

- broad flexibility for states to manage Medicaid without federal prescriptions and time-consuming requests for waivers from federal law;
- repeal of legal restrictions and mandates for methods of payments to doctors and hospitals for health services, citizen eligibility for free or low-cost services, and the range of services provided under Medicaid; plus
- reforms in medical liability and

health-care administration.

Nearly half of Congress's proposed budget savings, which are supposed to produce a balanced federal budget by 2002, will come from restraining public health-care costs.

Welfare reform is another major state concern. States agree that reform is needed to require aid recipients to shoulder more responsibilities and to work for benefits. This new philosophy envisions welfare as a hand-up rather than a handout. In turn, states call for broad flexibility in block grants to design programs that meet each state's particular needs. A federally supported contingency fund also is needed to cover increased welfare costs during economic downturns.

Federal tax proposals, especially for a national sales tax or a flat income tax, are another major federalism concern of the states. Most of the proposed federal tax changes would depress state revenues over time.

The single largest source of state revenue is the sales tax. If it moves into the states' "tax turf" by enacting a national sales tax or a value-added tax, the federal government will make future state action in this field more difficult. In fact, states would be pressured to conform to the federal sales or value-added tax. A value-added tax, which is used in many European countries, is essentially a tax added to the value of a product at each stage of its production. Ordinarily, the sum total of the tax is included in the final price of the product paid by the consumer. Hence, it's similar to a sales tax. Both sales taxes and value-added taxes are called "consumption taxes" because you pay when you buy something.

A flat federal income tax would do away with tax credits and deductions that now benefit states. For example, a flat tax would eliminate the federal exemption of interest earned by investors in tax-exempt state and local bonds that help to pay for roads and schools. This would make bond financing more expensive for state and local governments. A flat tax would also end the federal income-tax deduction for state and local taxes. In addition, states would come under strong pressure to conform to the simplification of the new federal income-tax system.

Finally, states are concerned, too, about whether the federal government will honor its commitments as a federalism partner in domestic services that transcend state boundaries and are in the national interest, such as transportation, environmental protection, criminal justice, and civil rights.

None of these state concerns are new, but the urgency for effective action has arrived. This urgency is driven by a call from the people to stop deficit spending by a certain time. What is new is a move by the people to make each government—federal, state, and local—more responsive to the taxpayer and to the average citizen and less obedient to special-interest and single-issue groups. ♦

Resources

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A Conference of the States: A Plan to Restore Constitutional Balance in the Federal System

Rita G. Koman

A coalition of the Council of State Governments, the National Governors' Association, and the National Conference of State Legislatures created a Steering Committee in 1994. Its purpose was to draw up a Resolution of Participation in a national Conference of the States. The resolution is a bipartisan effort calling on state leaders to gather at a formal session, perhaps in Philadelphia, to review the federal-state balance of power.

Each state is requested to appoint a seven-person delegation of legislators and its governor. Once a majority of state legislatures has adopted the resolution and chosen their delegates, they will meet to establish rules, guidelines, and procedures. States would present their proposals for reform. Review committees would be organized to screen and analyze state proposals. Finally, an agenda would be set for the actual conference.

At the conference, state delegations would discuss ways to correct what they consider an imbalance in the federal system. During this century, the federal government has used its tax and deficit-spending abilities to increase its power. The federal courts have also interpreted the U.S. Constitution broadly to allow larger roles for the federal government. This expansion often enjoyed public support because federal power was used, for example, to stimulate the economy, battle racial segregation, expand civil rights, establish social welfare programs, and protect the environment. Slowly, the autonomy of the states eroded, partly because many state and local governments failed to address these areas or were willing to let the federal government take the lead in order to obtain federal dollars in exchange for their support.

Today, many Americans wonder if the federal government has gotten too big and bureaucratic. More citizens now express more trust and confidence in their local and state governments than in the federal government. Many are asking, how can we preserve what's best and most needed in Washington, while restoring state and local powers that bring government closer to the people?

State and local officials criticize "one size fits all" federal programs and regulations that do not always meet local needs or solve social problems. State and local officials are especially agitated about the growth of "unfunded mandates." Such mandates require states and localities to obey federal rules or provide services without federal funding. Governors call this "credit-card federalism." The federal government makes policies, but state and local governments must pay the bills.

Many observers believe that unfunded mandates violate democratic accountability because they create a "fiscal illusion," which leads voters to believe that programs are cost-free. Accountability requires that, when federal officials enjoy the pleasure of enacting popular policies, they should also endure the pain of asking taxpayers to pay for them. (In turn, local governments complain that the states impose more unfunded mandates on them.)

Although the Congress passed an Unfunded Mandates Reform Act in March 1995, many state and local officials see a need for stronger action. The bipartisan Conference of the States, therefore, will focus on structural governance of the federal system, not on single issues promoted by special interest groups. The rationale is that the Congress pays only lip service to change. If the states want action, they must speak with a unified voice. Possible ideas for structural change might include the following.

Article V of the Constitution could be changed to permit state-initiated amendments. Article V says that if two-thirds of the states petition for amendments, the Congress must call a constitutional convention. This method has never been used, because hardly anyone has ever wanted another convention. It could become a "runaway" vehicle to wreck the Constitution.

A new method could be added to Article V to allow two-thirds of the states to propose a specific amendment. The Congress would then have two years in which to veto the proposed amendment by a two-thirds vote of both houses. If the Congress did not veto it, the amendment would become a part of the Constitution or be returned for ratification by three-fourths of the states. The National Governors' Association adopted such a proposal in 1988 under the leadership of then Governors John Sununu of New Hampshire and Bill Clinton of Arkansas.

Another idea would be to allow two-thirds of the state legislatures to

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Rita G. Koman was a secondary teacher of American history and government for 17 years. She is now an education consultant in Manassas, Virginia.

"sunset" (that is, terminate) a federal law. This change might also allow the Congress to override the states by a two-thirds vote of both houses.

Other ideas might include an amendment (1) requiring the U.S. Supreme Court to umpire federal-state relations by enforcing the Tenth Amendment, and/or (2) adding to the Tenth Amendment a list of powers specifically reserved to the states.

Many state and local officials believe that if a balanced-budget amendment is added to the U.S. Constitution, that amendment should also ban unfunded mandates. Otherwise, the federal government will be too tempted to balance its budget on the backs of state and local taxpayers.

None of these ideas has been endorsed by the conference coalition, but they illustrate the kinds of structural issues that could be addressed by the state delegations. The conference is expected to produce a States' Petition, which will represent the "highest form of formal communication between the States and the Congress" short of a petition triggering a constitutional convention. Although the States' Petition will lack the force of law or binding authority, it will have gained political clout and public credibility from its state-initiated process.

Before going to the Congress, however, the state legislatures would have to show majority approval of the petition. Representatives of each state would then convene in Washington to present the petition to Congress and request a formal response. The coalition believes that Congress will respond because rejecting the petition would result in a roaring national political debate that could backfire on the Congress. A positive response would help restore checks and balances in the federal system, allowing states more leverage to compete for power over their own affairs.

Whether the 50 states will achieve enough unity to hold the conference and agree on a States' Petition remains to be seen. Only 14 legislatures adopted the conference resolution in the first half of 1995. Opposition was expressed by some interest-groups on both the right and the left. Some opponents fear that the conference will become a constitutional convention, even though such a transformation of the conference would be legally impossible. Other groups fear that restoring any powers to the states will undercut benefits they now get from the federal government.

Whatever the outcome, the broad bipartisan discussion started by the conference process has elevated federalism to a higher level of national consciousness and stimulated debate about the future of our federal system in the 21st century.This dialogue will be augumented by a Federalism Summit held by state leaders in Cincinnati on October 22–24, 1995. ♦

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Which level of government should run the following programs?

	FEDS	STATE	LOCAL
Welfare	38%	40%	17%
Opportunities for minorities	35	30	28
Air and water quality	35	40	22
Public education	21	47	30
Employment/job training	15	59	24
Law enforcement	15	36	45

Source: "The Dimming American Dream," State Legislatures, *July/August, 1995. Poll of 1,003 adult Americans conducted by Hart and Teeter.*

The **UPDATE PLUS** staff regrets that, despite the care we take to ensure accuracy, occasionally errors creep into our publications. On page 5 in the latest issue of *Update on the Courts,* the last sentence in the first full paragraph, third column, should read "...holding that the Government could extend the Act to private acts on private property." Make sure to cross out the term *not* in your issue before sharing with students.

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aching Strategy

A Student Conference on Federalism in the U.S. Constitution

Rita G. Koman

Background

When the delegates to the 1787 Convention met in Philadelphia, the states were more powerful than the general government that had been created by the Articles of Confederation in 1781. When they invented federalism, the delegates aspired to create what James Madison called "a partly national" government empowered to do things in the general interest of all the states and the people, such as defending the nation and regulating commerce between the states. A key idea of federalism was to balance power between the federal and state governments while still maintaining limited government.

Madison argued in *The Federalist* that the built-in checks and balances of federalism and the separation of powers, as well as the amending process, would keep the Constitution forever viable. His fellow Virginian, Thomas Jefferson, thought more frequent change might be necessary. As Minister to France during the Convention, Jefferson was not involved in the adoption of the Constitution. Consequently, his views of it may be more objective. In analyzing the Constitution's viability, he wrote to Samuel Kercheval in 1816:

> Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment I am certainly not an advocate for frequent and untried changes in laws and constitutions. ... But ... laws and institutions must go hand in hand with the progress of the human mind.

Few of the founders assumed their document would survive unaltered by time. There was always the possibility that in the future, states would call for other conventions. Thus, today's initiative of state legislatures and governors to call for a Conference of the States fits in with historical expectations.

Students will assume positions of active citizens by holding a mock Conference of the States and role-playing its members. They will scrutinize articles of the Constitution in order to understand self-government in a federal democracy. Jefferson, in his 1818 *Report of the Commissioners for the University of Virginia*, listed these goals for students:

> To know his rights; to exercise with order and justice those he retains; to choose with discretion the fiduciary of those he delegates; and to notice their conduct with diligence, with candor, and judgment.

Objectives

As a result of this lesson, students will

- Develop a better understanding of the institutions and principles of American federalism
- Debate and discuss critical constitutional issues of federal-state relations
- Exchange ideas both for and against changes in the balance of power between the states and the federal government.

Target Group: Secondary students
Time Needed: 3–4 class periods
Materials Needed: U.S. Constitution, copies of bibliography, current journals, and periodicals

Procedures

1. To begin, have the class set an agenda around three constitutional issues. Choices could be from the following:
   a. Amending Article V of the U.S. Constitution to provide for state-initiated amendments;
   b. Allowing a 2/3 or 3/4 vote of the states to "sunset" (that is, terminate) a federal law;
   c. Providing state authority to set term limits for members of Congress;
   d. Requiring judicial responsibility to umpire federal-state relations by enforcing the Tenth Amendment;
   e. Spelling out specific powers reserved for states;
   f. Adopting a balanced-budget amendment to the U.S. Constitution while protecting state and local governments against unfunded mandates;
   g. Examining the current federal-state relationship;
2. Assign each student to one issue committee. Issue committees meet to
   a. Discuss assigned issue in depth.
   b. Plan research to find historical facts and current opinion to support pro and con arguments.
   c. Invite state and local officials and/or members of Congress to class to discuss issues.
   d. Outline pro and con arguments and arrange presentation strategy.
   e. Organize a roster of equal pro and con speakers (approximately 2–3 speakers preside).
3. Hold a large group session and determine order of issues.
   a. Align speakers pro and con on opposite sides of a podium as they intend to speak.
   b. Speeches are given for 3–5 minutes in a pro-con alternating style.

c. Allow 15 minutes for questions and comments from the floor, limiting students to one question of 1–2 minutes each to avoid domination by a few.

d. Follow parliamentary procedure and have timers maintain schedule.

4. Once all three committees have presented their ideas, hold a summary session.

a. Representatives of each committee give an overview of the issues, arguments, questions, and comments made on their issue.

b. Students may add other thoughts or suggestions for reform.

c. Students evaluate their conference in terms of form and content.

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aching Strategy

Nitty-Gritty Federalism: Managing Solid Waste

Joseph C. LaRocco and Harry E. Gregori, Jr.

Adapted from the ***Rector and Visitors,*** University of Virginia © 1989.

Background

Heightened concern over the environment provides teachers with exciting opportunities for organizing activities that engage students in problem solving. One effective way to approach the study of environmental problems is through the use of a simulation.

A well-conceived simulation allows students to examine an environmental dilemma that clearly shows the magnitude and complexity of the issues involved. Any meaningful simulation must include perspectives of various groups and individuals, from industrial and governmental positions to personal views.

Simulations are an excellent way to motivate students and make them aware of the compelling interests and decision-making processes in democratic societies.

Objectives

As a result of this lesson, students will

- Recognize the relationship between local, state, and federal governments
- Increase their awareness of the complexity and controversy associated with landfill siting
- Become involved in discerning and clarifying the choices available to local governments in establishing a new solid-waste landfill
- Identify competing groups and interests in solid-waste disposal-site decisions

Procedures

1. Start with Handout 1, the 10-question quiz on general knowledge of waste management. After administering the quiz, review the questions and discuss the answers. The following provides possible answers.

(1) d. Many of our disposable products are hazardous. Paint cans, aerosol sprays, cleaning liquids, oil, nail polish removers—it all adds up.

Joseph C. LaRocco is a social studies teacher at Cave Spring High School in Roanoke County, Virginia. Harry E. Gregori, Jr., AICP, is the director of policy and research for the Department of Environmental Quality in Richmond, Virginia.

(2) False. Only 2 percent is hazardous, but this small part is dangerous and, thus, gets a great deal of attention.

(3) a.

(4) This is a good question for debate. If we all wanted to live like cave people, the answer may be "true." In reality, the answer is "false." It just isn't possible if we want to live the way we do today. For instance, how many people want to stop driving cars?

(5) The United States, because we simply make more disposable products. The other countries do have waste problems, but as far as can be determined, the U.S. leads these four countries in waste generation.

(6) Local governments, and the costs are increasing every year.

(7) a. We throw away more paper than plastics, glass, or yard wastes. Yard waste is second. Plastics take up a great deal of space, but far more paper is thrown away than plastic or glass.

(8) c.

(9) True. Many states have interstate trade agreements about shipping all types of waste products. Many states restrict the types of waste sent across their borders. Many businesses transport waste products to other states and countries, while others depend on waste products to help them make their products (for example, some companies recondition car batteries).

(10) d. Much of what we throw away can be recycled.

2. Review the information in the box *Statistical Review of Waste Management,* to provide information about the answers to the quiz.

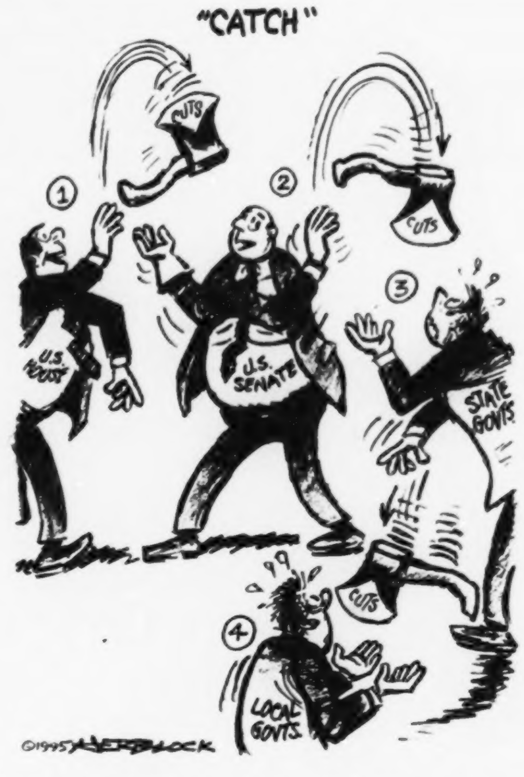
3. Use Handout 2, Responsibilities of Governments, to explain the complex responsibilities between local, state, and federal governments in dealing with solid waste. In this case, the state in question is Virginia. You may wish to replace the state and local information with your own state and local information.

4. Review Handout 3, Simulation of a Local Waste-Management Problem. Assign class members to play the roles as needed in the scenario. (It is suggested the teacher play the role of the administrator to help keep class order and to keep the simulation moving.) The preparation for the simulation usually takes one class period, and the actual simulation takes about 45 minutes. At the end of the discussions, each board member must tell which landfill site he or she voted for and why.

Statistical Review of Waste Management

- Each person in the U.S. generates approximately four pounds of waste each day.
- There are over 1,200 National Priority List (superfund) hazardous waste sites in the United States targeted for cleanup by the Environmental Protection Agency.
- Hazardous wastes make up about 2 percent of all the waste generated in the U.S.
- Paper and paper products make up 38 percent of all waste generated in the U.S.
- Sixty-eight percent of the country's total waste volume is sent to landfills, 10 percent is incinerated, and 22 percent is recycled.

Source: Virginia Department of Environmental Quality. U.S. Environmental Protection Agency, The Solid Waste Dilemma: An Agenda for Action *(September 1988);* Solid Waste: State and Federal Effort to Manage Nonhazardous Waste. *USGAO: February 1995;* Characterization of Municipal Solid Waste in the United States: 1992 Update. *EPA: July 1992.*



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Student Handout 1

Questionnaire on Waste Management

1. The average American family directly or indirectly generates approximately how much hazardous waste every year? (a) 200 lbs. (b) 500 lbs. (c) one ton (d) 7,200 lbs.

2. True or false: The largest percentage of waste generated in the United States is considered hazardous.

3. About what percentage of all waste generated in America is hazardous? (a) 1–2 percent (b) 10–12 percent (c) 25–30 percent (d) 35–40 percent

4. True or false: It is possible for our society to stop generating hazardous waste.

5. Which one of the following countries generates the most waste? (a) People's Republic of China (b) Russia (c) Japan (d) United States

6. The bulk of the financial burden for disposing of waste falls upon the (a) local governments (b) state governments (c) federal government.

7. Which one of the following generates the most volume of waste in America? (a) paper (b) glass (c) plastic (d) food waste (e) yard waste

8. Approximately how many National Priority List (superfund) hazardous waste sites were there in the United States as of July, 1995? (a) 150 (b) 750 (c) 1,250 (d) 1,500

9. True or false: The Constitution of the United States allows the government and private industry to transport waste products across state lines.

10. What percentage of waste can either be reduced or recycled using today's known technology? (a) 25 percent (b) 50 percent (c) 75 percent (d) 90 percent

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Student Handout 2

Responsibilities of Governments

Federal Government

The federal government

- supervises and controls the disposal of hazardous wastes. (All states and localities have to abide by these regulations.)
- enforces the rules and regulations concerning the interstate and foreign trade and shipping of these wastes.

The U.S. Environmental Protection Agency (EPA) monitors all hazardous sites and requires that hazardous materials be dumped in areas separate from nonhazardous areas. EPA also has a "Superfund," which provides funds to take care of some of the immediate problem areas in the country. These cleanup projects are funded either entirely by federal money or by the state sharing some of the costs.

Congress and the courts legislate and enforce the regulation of these hazardous wastes. The government can impose fines and penalties on people, governments, and businesses that violate the laws. There are numerous laws on the books to protect the environment, and new legislation is pending that includes banning the use of certain toxic substances.

State Government

The Virginia Department of Environmental Quality oversees

1. solid-waste management
2. hazardous-waste management (enforces the federal laws)
3. waste-disposal sites and hazardous-waste facility site certification
4. transportation of hazardous materials
5. federal and state site-cleanup program ("Superfund")
6. low-level and high-level nuclear wastes
7. litter control and recycling
8. legislation about waste management in Virginia

The General Assembly passes legislation that regulates waste disposal in Virginia.

The Virginia courts resolve conflicts arising under these laws.

Local Governments

Dillon's Rule applies to the local governments' waste-management responsibility, that is, localities must comply with the state laws and regulations and may not initiate new areas of legislation on their own without state permission.

Local governments:

- Manage the disposal of solid waste (Sec. 15.1-2801-2821 of the Code of Virginia), abiding by the Solid-Waste Management Act of the General Assembly.
- Establish ordinances about the proper disposal of wastes.
- Bear the brunt of the costs of waste disposal. How these costs are divided is left to the discretion of the local governing body.
- Have most of the legal as well as financial responsibility for dealing with waste management.
- Set up zoning ordinances about the siting of landfills in compliance with federal and state regulations.
- Work with the state and federal government agencies to deal with serious toxic spills or accidents.
- Article II of the Virginia Waste Management Act requires that every local government develop and carry out a comprehensive land-use plan, which includes a plan for waste disposal. The locality can provide for these arrangements in the following ways:
    1. They can form a regional partnership with surrounding communities to share the burden and costs.
    2. They can contract with a private firm to handle their waste-disposal system. The locality is still ultimately responsible for overseeing this private firm's actions.
    3. The government itself can take care of and control the disposal of waste.

Student Handout 3

Simulation of a Local Waste-Management Problem

Scenario for the Simulation

You are the citizens and the Board of Supervisors of the County of Lovelyland (Any State, USA), which has 50,000 people and is growing steadily at a rate of 2 to 4 percent each year. Your county runs the solid-waste facility and landfill. A number of owners of attractive new industries have inquired about Lovelyland's current labor force, low tax rate, excellent schools, and available land for building and resources.

Your county administrator informs you that the 450-acre county landfill will reach capacity within the next one to two years. He also explains that the longer the county delays, the more costly it will be to build a facility. The administrator asks the board to increase collection fees to help slow down the volume of waste being sent to the landfill. Perhaps this action would buy time for the facility until the new landfill is finished. The administrator suggests that residents be required to sort their trash. This would help recycling and reduce the amount of waste sent to the landfill.

The landfill operators have informed you that new EPA regulations have gone into effect. These regulations prohibit the dumping of such items as car batteries, "white goods" (water heaters, refrigerators, etc.) with motors intact, and toxic industrial wastes. You must provide for new facilities to handle the hazardous and nonhazardous waste. These new waste facilities will be rather expensive. Your sitting committees have given you the three possible site choices on this page.

You must locate a new landfill site at this meeting. (It takes about six months to two years to receive certification for a landfill site.)

The chairman and the supervisor from the "B" district are both up for reelection this year. The chairman lives in site A. Supervisors C, D, and E are up for reelection next year. Needless to say, there has been strong local opposition to each of these sites.

You must also inform citizens that the costs of building these landfills will increase their tax rate at least 10 to 15 percent over the next two years unless some other solutions can be reached.

This is the regularly scheduled meeting of the Board of Supervisors. Representatives from Sites A, B, and C are here to voice their protests to the potential landfill sites. Representatives from the industries, the schools, the lake developers, and the realtors are also present to voice their views.

You are reminded by the county attorney that if you do not proceed with the naming of a site; you will be in violation of the law, and each of you could be fined and/or jailed.

Site Choices

Site A is located within 1,000 yards of the most luxurious part of the county. Homes range in value in this area from $190,000 to $400,000. Over 100 affluent families live here. If this site is named, a number of people would be forced to relocate in order to meet the zoning ordinance. This site also has over 400 lots where new housing units could be built. Site A is rated as the most suitable for the landfill based on its environmental location and distance from the main water reservoir. Site A covers approximately 600 acres.

Site B is located about two miles from the main residential parts of the county. The site would be near the schools; garbage trucks would pass the schools daily. This area is about four miles from the new industrial sites. This 550-acre site is mostly forest and undeveloped land. Approximately 100 families live here. Most of them are small farmers and middle-income people who have lived here for years. This site is rated as second best.

Site C is a 700-acre tract of land near the small suburbs of the county. Most of the 400 families living here are middle-income wage earners. The site is marginally close to a stream that could be used to help develop a lake resort. Realtors and developers would like to get permission to develop this land for the potential lake area and for more middle-income housing.

Matters of Debate

Our federal system has always had its supporters and critics of national power. Recent criticism suggests that the U.S. Supreme Court has not sufficiently protected the states against growing national control.

Federalism: Importance of the States

Charles J. Cooper

Almost two centuries ago, a newly free and independent American people crafted a system of government unlike any that had ever existed. With the memory of British oppression of the colonies still fresh in mind, the founding generation was acutely aware of the danger to freedom posed by the concentration of power in a central government.

Accordingly, the framers of the U.S. Constitution fashioned a federal system of government under which power was dispersed between two sovereigns. The national government would hold only certain enumerated powers relating to matters, such as war and interstate commerce, which were beyond the competence of the individual states. The states would remain, as James Madison said, "A residuary and inviolable sovereignty" with respect to the "lives, liberties, and properties of the people...and the internal order, improvement, and prosperity of the states."

The founders thought that a balance of power between the states and the federal government was just as important as a system of checks and balances within the national government. As the U.S. Supreme Court has observed, "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front....In the tension between federal and state power lies the promise of liberty."

Much of the opposition to the Constitution grew out of fear that the federal government would extend its authority beyond its enumerated powers and would eventually drain the states of their sovereignty.

This concern, voiced in almost every state ratifying convention by the Anti-Federalists, led directly to the proposal and adoption of the Tenth Amendment, which expressly reserves to the states or to the people all powers not delegated to the federal government. In spite of the Tenth Amendment, the predictions of the Anti-Federalists have come to pass. The U.S. Supreme Court dramatically expanded Congress's power in 1942 when it ruled that Congress may regulate local activities that, when considered alone, have no impact on interstate commerce, if the cumulative effect of the activities might have significant national consequences. Under this aggregation test, Congress is free to regulate virtually any activity. Accordingly, over the past 50 years, Congress has enacted statutes reaching into many areas of traditional state concern, from divorce settlements to noise restrictions, from highway speed limits to crop production for home consumption.

As Congress increasingly regulates local activities and imposes uniform remedies to problems, the states are no longer able to act as laboratories for experimentation in formulating the most effective solutions to important problems, such as welfare reform. Another benefit of federalism is that it enables individuals to choose to live in a state that has unique governmental approaches that they find desirable, such as tough crime control or school choice programs. By eliminating the variety of state solutions to local problems, the federal government has vastly diminished this measure of freedom.

At the same time that Congress has increasingly exercised these broad powers, the Supreme Court has abdicated its responsibility to enforce the Tenth Amendment. In *Federalist* No. 39, James Madison wrote that the Supreme Court would vigilantly police the constitutional boundaries between the federal and state governments. The Supreme Court's role in

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Charles J. Cooper is a partner at Shaw, Pittman, Potts, & Trowbridge in Washington, D.C., specializing in constitutional litigation and federal administrative law.

resolving disputes between two sovereigns was necessary, Madison observed, to "prevent an appeal to the sword and a dissolution of the compact." Yet, in 1985, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court ruled, in effect, that it was up to Congress to decide whether it had encroached on states' rights. As Justice Sandra Day O'Connor noted, now "all that stands between remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint."

As Congress has taken advantage of the Supreme Court's failure to enforce the Tenth Amendment, federalism has ceased to be a structural limitation on the federal government's power. And with the demise of federalism went a substantial measure of the freedom that defines us as Americans. Currently, many governors, state legislators, and members of Congress who are committed to the principles of federalism are working to restore state sovereignty and to rein in excessive intervention by Washington, D.C. For example, earlier this year, Congress passed a law that limits the ability of the federal government to pass costly unfunded mandates, which require the states to pay for programs enacted by Congress, not by the states. Supporters of states' rights are considering several other ways to reinvigorate federalism, including proposing constitutional amendments that would empower the states to defend their sovereignty. If these efforts are successful, federalism will once again serve as an important protection of the individual liberties of all Americans.

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Federalism: Importance of the National Government

Herman Schwartz

By definition, federalism implies a division of government power between a central government administration and constituent units. And whenever power is divided, conflicts are inevitable.

These conflicts were not only foreseen by the founders of our nation, but they were intended and welcome. In 1787, the central government was very weak and the states were very strong. The states were not about to give all of their power to a remote central government.

The result was a government structure that allocated key powers to the central government, including the power to act directly on the people, to tax them, to regulate interstate commerce, and to perform a variety of other specific functions, together with the authority to enact all "necessary and proper" laws to implement these powers. Powers not delegated to the federal government remained with the states.

Herman Schwartz is a professor of law at The American University in Washington, D.C.

Some of the founders, like James Madison, Alexander Hamilton, and John Jay, preferred a more nationalized structure, but state political power was too great and there was too much fear of a strong central government. Also, we were then a small, fragmented, and weak nation, largely agricultural and preindustrial, with our people separated from each other by days of travel and inadequate communications. It made sense for most government functions to be performed locally, and for the national government to be limited to a few specific functions. The division of power between the national and state governments also was justified as necessary to ensure liberty by preventing excessive concentration of power in the national government. Although that is a clearly worthy objective, it has often taken strong federal power to counteract local abuses. Legal segregation would never have been abolished had it depended solely on the actions of the local community. Only a distant authority reflecting a broader and more detached outlook could overcome what Madison referred to as "local prejudices and schemes of injustice."

Nevertheless, up to the Civil War, while we remained a small, scattered preindustrial society with sharply different sectional interests, the states were dominant, even though committed states' rights adherents like Thomas Jefferson soon realized that national power had to be interpreted expansively if the needs of the new nation were to be met.

Right from our earliest years, however, it was also clear that adherence to states' rights was a "sometime" thing. The nationalist Madison came out strongly for a state's autonomy, when he joined Jefferson in writing the Virginia and Kentucky Resolutions against the Federalist Alien and Sedition laws. Southerners who supported state nullification of federal law also called for vigorous enforcement of the federal Fugitive Slave laws.

The pattern persists today. When they want something from the national government, state governments and private interests back national power. When they don't like what Washington is doing, states' rights become a matter of religious faith.

Today, there can be no obvious and sharply defined limits to national power. The national economy is too

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tightly intertwined, and the need for uniform nationwide federal protection for civil liberties is too great for formal or categorical limitations. The choice between national and local authority must depend on where a particular need can best be met. For many purposes, the task is best done on the local level because the federal government is often too remote and impersonal to respond adequately to the diverse needs and interests of communities. Much of the time, a partnership between federal and local governments is necessary.

On the other hand, child labor or unsafe factory conditions, even though local phenomena, can be handled effectively only through uniform nationwide measures.

Nor is it true that state and local governments have a monopoly on virtue and competence. There is at least as much corruption among state and local officials as among federal officials, and sometimes more. Anyone who has dealt with local or state functionaries knows that arrogance is found not only in Washington.

A constitutional line between federal and state powers can rarely be drawn categorically. The conflict must be decided pragmatically and politically. As long as it is decided on those grounds, such conflict is useful, for it forces each level of government to justify itself. And in a free and vibrant society, that is a good thing. ◆

aching Strategy

School Safety and Congress

Frank Kopecky

Background

In 1990, Congress passed a law that required schools to take certain steps to reduce violence. Federal funding was made available for schools to implement certain programs. Part of this law made it a federal offense to bring a weapon on or within 1,000 feet of school grounds. A case before the U.S. Supreme Court challenged the constitutionality of this law. A lower federal court agreed that the law was unconstitutional, not because it violated the Second Amendment but because Congress exceeded its power under the Constitution's commerce clause.

Objectives

- Learn of federalism and Congress's power under the commerce clause
- Learn about the Supreme Court process
- Analyze Supreme Court opinions and develop a position on an opinion
- Develop student awareness of school-safety issues

Target Group: Grades 10–12
Time Needed: 2–3 class periods
Materials Needed: Handouts 1–2

Procedures

1. Have students look for news articles that discuss transfers of power to the states, increases in violence, and gun control. The transfer of power to the states is a major theme of the Republican "Contract with America." Crime and gun-control issues are in the news quite often. You may easily focus this lesson on the Supreme Court's role or the growth of the federal government following Franklin Roosevelt's New Deal in the 1930s.
2. Throughout the lesson, remember that vocabulary development is important. Make sure students understand any difficult words.
3. Tell students that this case involves the question of federalism. Define *federalism,* and relate it to current developments in the news. Inform students that the Constitution authorizes the Congress to make laws only in areas granted to it. Some lawmaking authority was left to the states. This division of authority between the federal and state governments is a major aspect of federalism.
4. Distribute the case and two opinions and read them together. Ask: What is the issue in this case? What must the Court decide? (The issue is whether Congress exceeded its commerce clause authority to regulate interstate commerce when it prohibited the possession of firearms near schools.) Have students decide whether they agree with Opinion A or Opinion B as well as why they agree. Conduct a poll by a show of hands to determine which opinion students agree with.
5. Divide the class into groups of five or six. Give each group an opinion to support. Each group should assign a recorder to write down the group's ideas and a spokesperson to report the arguments to the class. Have groups identify each argument in the opinion and rank the arguments from most to least important. Tell students they are free to add arguments supporting the opinion. If some students in the group

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Frank Kopecky is a professor of legal studies at the University of Illinois—Springfield and editor of the Illinois State Bar Association Law-Related Education Newsletter. *Mr Kopecky is on the American Bar Association Advisory Commission on Youth Education for Citizenship as well as the* Update on Law-Related Education *Editorial Advisory Board.*

do not agree with the opinion, ask them to think as lawyers would and to help defend the opinion.

6. Tell students that they have seven minutes to list the arguments. Circulate, giving any needed instruction, or prompt discussion with questions.

7. Begin class discussion by asking the spokesperson from a group supporting Opinion A to give its highest ranked argument. Next ask a spokesperson supporting Opinion B to respond to the argument given for Opinion A, and so on. As the arguments are being elicited, write them on the board under "Opinion A" or "Opinion B."

8. Continue the discussion, ensuring that students from each group have a chance to contribute. When the arguments have been exhausted, congratulate students on their analysis and respond to their arguments.

9. Explain that one of the opinions summarizes the Supreme Court's majority and concurring opinions. Ask students to identify which one this is.

10. Tell students that the Supreme Court decided this case in 1995 and held that Congress had exceeded its authority under the commerce clause in attempting to regulate a local activity—education—without providing factual findings that detailed the connection between the proscribed activity and interstate commerce. The Court noted that the Act could not be upheld as a regulation of purely commercial or economic activity because it did not relate to the business or commercial aspects of gun sales. The Court, however, observed that the act could be upheld if the conduct Congress sought to regulate could be shown to be substantially related to interstate commerce. While acknowledging this test, the Court rejected the government's efforts to provide the necessary substantial relationship between the possession of a firearm on school grounds and interstate commerce. The Court was unconvinced by the U. S. government's argument that firearm possession on school grounds would create violent crimes that would cost the national economy in one of two ways, either of which could provide the constitutionally required substantial relationship to interstate commerce.

Case Background

In *United States v. Alfonso Lopez*, the Supreme Court was asked to decide an issue of federalism. Basically the Court was asked to decide whether the federal government or the state and local governments should regulate guns on school grounds. The Court found that Congress (the federal government) did not have the power under the commerce clause to enact the statute regulating guns. This was the first time in more than 50 years that the Court declared unconstitutional a congressional law as being outside the powers granted by the commerce clause.

The constitutional history of the relationship of the federal government to the states for the last 50 years has been one which has seen an increase of powers given to the national government and a decrease in the protection afforded the states under the Tenth Amendment. (The changing nature of our federal system is developed more completely still in the article by Chemerinsky found in this issue of *Update*.) The *Lopez* case may prove to be an important addition to the history of federalism.

Commerce Clause Article I, Section 8, clause 3 of the Constitution states: "[Congress shall have the power] To regulate commerce with the foreign nations, and among the several states, and with the Indian tribes."

The whole debate about the power of commerce turns on what is meant by the word *commerce*. If *commerce* means anything that affects the economy, then there is virtually no limit on congressional power. If, however, *commerce* means business transactions, such as contracts made by individuals in two different states, then the power of Congress is much more limited. Chief Justice John Marshall and the Supreme Court in the case of *Gibbons v. Ogden*, 9 WHEAT 1, 6 L. Ed. 23 (1824), started the debate with an expansive definition of powers. By the time Congress started to regulate economic activities following the growth of industry in the latter half of the 19th century, a different group of justices was on the Supreme Court. They held a different philosophy of the role of government. Up until the end of the 1930s, the Supreme Court defined commerce narrowly.

However, by 1940, the President was able to appoint justices to the court who believed in an activist role for the national government. They defined *commerce* broadly. In recent years, Congress has become increasingly willing to use its authority under the commerce clause to expand its power. In fact, until *Lopez*, there were few, if any, limits upon the type of problem Congress addressed under the commerce clause. Following *Lopez*, Congress will now have to make findings that commerce will be impacted by the legislation. A *finding* is a determination of a bill's intended effect, often found in its preamble or in the records of debate.

Tenth Amendment

The Tenth Amendment was added to the Constitution as part of the Bill of Rights to give the states some protection from growing national powers. It reads:

> *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

The language basically recognizes the role of the states as the primary lawmakers. Criminal law, for example, has historically been a matter of state concern. Up until the 1960s, virtually all crimes were defined and regulated by state law. The Tenth

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Student Handout 1

Gun Control
United States v. Alfonso Lopez, Jr.
Docket No. 93-1260
U.S. Supreme Court

Facts: In 1990 Congress passed the Gun-Free School Zones Act, which made it a federal crime to bring a gun on a school campus or within 1,000 feet of school grounds. Concern about crime and school violence had led to the passage of several laws by Congress making funds available for school-safety programs, drug and gang prevention, and electronic monitors.

On March 10, 1992, Alfonso Lopez, a 12th-grade student at Edison High School in San Antonio, Texas, was caught with a 38-caliber handgun on the school grounds. He had the gun so that he could sell it to another student for use in gang activities. He was arrested and initially charged with violation of a Texas criminal law prohibiting guns in school. Similar laws had been enacted by about 40 states. These state charges were dropped when the federal government decided to prosecute Lopez under the Gun-Free School Zones Act.

Lopez was convicted and sentenced to six months in jail and a two-year probation. He appealed his conviction on the grounds that it is beyond the power of Congress under the Constitution's commerce clause to regulate gun use in local schools and that the regulation of guns is an issue better left to local and state governments. The Court of Appeals agreed with Lopez's position and reversed the conviction. The case went to the U.S. Supreme Court, which decided it in April 1995.

Issue: The Supreme Court was asked to decide the case on the basis of whether Congress may use its power to regulate commerce to punish a person who brings guns to school or whether this is an area reserved to the states for lawmaking. Although the case involved the federal government's control of handguns, the Second Amendment was not raised.

If you were a Supreme Court Justice, which of the two opinions would you agree with? One of the opinions is a summary of the majority opinion of the Supreme Court, the other the dissenting opinion. After discussion, your teacher will identify the majority and dissenting opinions.

Vocabulary

federalism—division and sharing of power and authority between a general, nationwide government and two or more constituent (i.e., state) governments

powers—legal abilities or authority to act

finding—a determination of a bill's intended effect

intergovernmental relations—relationships of cooperation, competition, coordination, and/or collusion among federal, state, and local governments

1. Why do you think the opinion you chose is better?

____

2. Are there additional reasons you would like to add to support your position?

____

3. How do you think the U.S. Supreme Court actually decided this case?

____

4. If you favored the decision that was the dissenting opinion, does that mean your position is wrong?

____

Student Handout 2

Opinion A

The Gun-Free School Zones Act is unconstitutional. The power of Congress to pass a law under the commerce clause is limited. This act neither regulates a commercial activity nor contains a requirement that the possession of a gun be connected in any way to interstate commerce.

The Constitution created a national government of limited and specified powers. The sharing of power between the federal government and the states, known as federalism, allows states to adopt different approaches to social problems and regulatory activities.

The Constitution gives Congress the power to regulate commerce, and this power is very broad. However, there are limitations on Congress's power under the commerce clause. According to an early Supreme Court decision, commerce is not intended to include internal state activities that do not extend to or affect other states. In fact, about 40 states have enacted a law similar to the School Gun-Free Zones Act. The states have also been free to experiment with other methods of preventing school violence, such as metal detectors and peer-mediation programs. The national government should not interfere with these activities under an extremely broad definition of commerce.

Congress may regulate three broad categories of activity under its commerce power. First, it may regulate the use of the channels of interstate commerce. Second, it has the power to regulate and protect interstate commerce even though a threat to it may come only from intrastate activities. Finally, it has the power to regulate those activities having a substantial relation to interstate commerce. However, Congress may not use a relatively trivial impact on commerce as an excuse for broad general regulation of state or local activities.

The power of Congress to enact the Gun-Free School Zones Act cannot be derived from the first two categories. The act does not regulate the use of the channels of interstate commerce, nor does it attempt to regulate local activities that threaten interstate commerce. Thus, only the third category can be applied as a test of Congress's power in the Gun-Free School Zones Act. Is the act a regulation of an activity that substantially affects interstate commerce? No, the Gun-Free School Zones Act is an act to regulate a local activity. It is not an essential part of a larger regulation of economic activity affecting interstate commerce. The regulation of a state or local activity that has little interstate economic impact is best left to the states.

Opinion B

Under the powers given to it by the commerce clause of the Constitution, Congress is empowered to enact the Gun-Free School Zones Act. This act is an attempt to reduce violence harming the educational system. The impact of crime on our schools has a substantial effect on the national economy that Congress may address.

Three basic principles of the commerce clause support the act. First, Congress may regulate local activities that significantly affect interstate commerce. Its power over commerce is broad and complete. Second, when a local activity has a significant effect on interstate commerce, Congress must consider the cumulative effect of all similar activities (the effect of all guns possessed in or near schools). Third, Congress must have a degree of leeway in determining a significant connection between an activity and interstate commerce for two reasons. The Constitution delegates commerce power directly to Congress. The balance of power between the states and the federal government is essentially a political question best left to the Congress to decide.

Congress has found that violent crime in school zones affects the quality of education and, in turn, will significantly affect the country's economic interests. Many studies show that the serious problem of guns in and around schools is widespread. For example, 12 percent of urban high school students have had guns fired at them, and 20 percent of those students have been threatened with guns. In any 6-month period, several hundred thousand children are victims of violent crimes in or near school. Studies also show that violence in schools significantly interferes with educational quality. School violence has been linked to high dropout rates and lower achievement. Congress could, therefore, conclude that guns contribute substantially to this educational problem.

Congress could have also found that gun-related violence in and around schools is a commercial, as well as a human, problem. There is a clear link between the amount of schooling and potential earnings. Better educated workers make our country more competitive, and most job growth can be attributed to better educated workers. Also, the business of schooling makes up an important part of our economy. In 1990, primary and secondary schools spent $230 billion—a significant portion of that year's $5.5 trillion Gross Domestic Product.

As government and economic issues become more complex, Congress is in the best position to determine what issues need a uniform national approach. The Gun-Free School Zones Act is consistent with the evolving definition of federalism.

Dimensions of Modern Federalism

States are dynamic actors in their own right, often going further than the U.S. Bill of Rights in broadening rights protections under their state constitutions. States are also active in the global arena, and federalism is a model for reform worldwide.

The New Judicial Federalism: State Courts Protecting Rights Under State Constitutions

Robert F. Williams

Claus von Bulow, whose trial was popularized in the film *Reversal of Fortune*, might not be a free man today if it were not for the protections given for individual rights in Rhode Island's state constitution. Incriminating evidence in his wife's death was thrown out by the state court under the state's rule that prohibits the use of illegally seized evidence in a criminal trial. This is called an "exclusionary rule." The decision hinged on the state supreme court's interpretation of search and seizure provisions in Rhode Island's constitution. These provisions are more protective of defendants' rights than the U.S. Supreme Court's interpretations of the Fourth Amendment in the *federal* Constitution's Bill of Rights. The U.S. Supreme Court later refused to review the state ruling because the decision was based on "independent and adequate" state law grounds, which the Court does not have the power to consider.

Each state has its own constitution, which includes a Declaration of Rights. The original 13 states had constitutions even before the federal Constitution. Many provisions of the U.S. Constitution were copied from state constitutions or were based on experiences under them.

Rhode Island is not alone in going further than the U.S. Supreme Court in protecting individual rights. The emergence since 1970 of many state high courts as assertive protectors of individual rights comes as a surprise to many people. The fact that state courts are expanding protections beyond those guaranteed by the federal Bill of Rights is even more surprising. This development, called the "new judicial federalism," seems contrary to the traditional experience of American federalism, which has seen the states overshadowed by the federal government in every field.

The new judicial federalism refers to the authority of a state court to interpret its state constitution (or even laws passed by the legislature) so as to provide broader rights protections than those recognized by the U.S. Supreme Court's interpretations of the federal Constitution. As in the von Bulow case, such state decisions are immune from U.S. Supreme Court review when they are based on "independent and adequate" state constitutional grounds. Examples of such state cases include a whole range of protections for criminal defendants, free speech, possession of firearms, privacy, payment for property taken by a government, and many others.

In a 1970 decision, for instance, the Alaska Supreme Court wrote:

> While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution.... We need not stand by idly and passively, waiting for constitutional direction from the highest court of the land.

The new judicial federalism allows state courts and legislatures to set rights standards that are higher, but not lower, than those established under the U.S. Constitution. States also may recognize rights, such as privacy and crime victims' rights, that are not even mentioned, at least not explicitly, in the U.S. Constitution. As such, the new judicial federalism conforms to an old principle of American federalism: that states may act where the U.S. government has elected not to act, as long as state action does not violate the U.S. Constitution or federal law.

State constitutions can be amended more easily than the U.S. Constitution. In 1982, for instance, Florida voters

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Robert F. Williams is Distinguished Professor of Law at Rutgers—The State University in Camden, N.J.

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prohibited their supreme court from going above the federal rights floor for the exclusionary rule. The voters approved a constitutional amendment requiring the state courts to follow only the U.S. Supreme Court's more conservative view of the exclusionary rule under the Fourth Amendment. At the same time, some states have amended their constitutions to provide expanded rights, such as for women and people with disabilities and for protection of the environment.

The new judicial federalism revives some basic questions about rights. If rights are universal, should they not apply equally everywhere? If not, what rights are universal, and what rights can vary among states? Just as women once crossed state lines to obtain abortions, will ambulances carry people across borders to states with more liberal right-to-die laws? Will some ambulances go in the opposite direction, carrying patients away from relatives eager to "pull the plug" under liberal state rules?

Although universal rights may seem to be the natural order, independent state constitutional interpretation offers opportunities to secure certain rights, at least in some places, when the nation or its highest court cannot agree on applying these rights. We have already seen signs of this with regard to privacy, victims' rights, women's rights, and environmental rights provisions in some state constitutions. In this way, states can serve as laboratories for rights experimentation. The whole nation learns from these experiments. ♦

Resources

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Federalism and Globalization of the U.S. Economy

Earl H. Fry

At a time when the White House and the Congress are feuding over which branch of government should dominate foreign policy, state and local governments have been quietly expanding their own activities overseas.

In the American federal system, authority is constitutionally divided and shared between the federal government in Washington, D.C., and the 50 states. State government leaders, therefore, believe they have the legal right to be involved in a variety of international activities. For example, more than 40 states now maintain about 140 offices overseas. In addition, almost all states have hired personnel to work on international issues, and many states sponsor official trips abroad each year.

Most of these state-sponsored activities are linked to America's growing involvement in a very complex and interdependent global economy. The United States is the world's largest trading nation, the largest recipient and initiator of foreign direct investment (type of investment that gives an investor in one country control over an enterprise in another country), and one of the leading destinations for foreign tourists. In total, perhaps 18 million U.S. jobs are linked to international trade, investment, and tourism.

Each state is competing for its share of these jobs and the revenues generated by businesses engaged in global commerce. Moreover, states are potentially powerful economic actors. There are about 190 nation-states in the world today. Each of the 50 U.S. states would rank among the top 75 nation-states in terms of what it produces annually in goods and services. Ten states actually rank among the top 25. Some states also have budgets larger than many nation-states. For example, during the 1995 fiscal year, California's budget was only slightly smaller than Russia's, at current exchange rates.

Recent actions by the federal government have also thrust state and local governments onto the international stage. The North American Free Trade Agreement (NAFTA) went into effect in 1994. Over a 15-year period, NAFTA will create free trade among the United States, Canada, and Mexico and may eventually be expanded to include Chile and other nations. Also in 1994, the U.S. Congress ratified the Uruguay Round accord of the General Agreement on Tariffs and Trade (GATT). The accord established the World Trade Organization (WTO), a multilateral institution with more than 120 member-nations. Both NAFTA and the WTO will permit other member-nations to lodge complaints against U.S. state and local governments for alleged "unfair trade" practices. Such practices might include discriminating against companies from other member-nations in the awarding of government contracts, giving government subsidies to in-

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Earl H. Fry is a professor of political science and Endowed Professor of Canadian Studies at Brigham Young University in Provo, Utah.

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state companies that export goods, or barring certain foreign-made products from being sold in a state. The federal government will have to work with NAFTA and WTO dispute-settlement panels on the one hand, and with state and local officials on the other, in order to resolve these complaints. America's commitments to NAFTA and the WTO also mean that states must be very vigilant about their own policies because their actions will be subject to growing international scrutiny and litigation.

In many respects, the increased involvement of states in the international economy is positive. Much of America's global competitiveness is being shaped at the grassroots as workers and businesses prepare to compete with their counterparts abroad. State governments can lead the way in helping the business community learn about opportunities beyond America's shores and in encouraging young people to study foreign languages, geography, and other relevant subjects.

However, the growing involvement of the states in international matters may have a few negative consequences. Some states might pursue protectionist trade and investment policies, which would complicate Washington's efforts to liberalize global economic linkages. Some state governments disagree at times with priorities established by the federal government. In recent years, for instance, certain states have pursued policies toward South Africa, the former Soviet Union, Northern Ireland, and Central America that were at odds with policies enacted by the federal government. Such contrary actions make it more difficult for the United States to speak with "one voice" on foreign policy issues in an era of growing international complexity.

Even so, the economic well-being of the United States has never been as dependent as it is today on international trade, investment, and tourism. In the future, our federal, state, and local governments must do a better job in coordinating their international activities and in cooperating with the business sector to ensure that America will become even more competitive in the 21st century.

Summary

Approximately 18 million U.S. jobs are linked to foreign trade, investment, and tourism. The United States' growing involvement in the global economy has prompted state governments to increase their own activity overseas, a trend that might improve U.S. competitiveness, but also complicates the formulation of foreign policy in America's federal system. In addition, the U.S. government has recently entered into regional and global trade accords (NAFTA and WTO), agreements that obligate not only Washington, D.C., but also the state and local governments to abide by new trade and investment standards adjudicated by international tribunals.

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Federalism on the World Scene

Daniel J. Elazar

Federalism is a major issue in world affairs. Our world is diverse, and we all need to live together freely and peacefully. Federalism can help because it seeks to achieve unity without destroying diversity. Federalism combines local *self-rule* with general *shared rule* through constitutional power-sharing on a noncentralized basis. As such, federalism spawns different power-sharing systems suitable to different circumstances and people's needs. To use a biological analogy, federalism is a genus that includes several species.

Daniel J. Elazar is a professor of political science and director of the Center for the Study of Federalism at Temple University in Philadelphia, president of the Jerusalem Center for Public Affairs, and Senator N. M. Paterson Professor of Intergovernmental Relations in the Department of Political Studies at Bar-Ilan University in Israel, where he also heads the Institute for Local Government.

One species is *federation*. Most people call this "federalism." It is the form of government invented by the founders of the United States in the Constitution of 1787. This form establishes a common general government for a polity (e.g., the United States of America) and its constituent units (e.g., the 50 states). The constituent units govern themselves and also share in the common constitution and government of the whole polity. Powers are delegated to the general government by the people of all the constituent units. The general government has direct access to every citizen (e.g., the federal income tax), and it has legal supremacy in its areas of delegated powers. A federation is usually seen as perpetual, but the union may be dissolved peacefully by the consent of all or a majority of its constituent

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units. Prime examples of modern democratic federations are the United States, Australia, Canada, Germany, and Switzerland. In all, there are 23 federations in the world today.

A second species is *confederation*. This was the common form of federalism before 1787. Here, the constituent units form a union, but they keep most of their sovereign powers. The constituent units retain control over the general government, which must work through them to reach their citizens. Sometimes units may secede from the confederation by prior constitutional agreement without the consent of the other units. Classic confederations included the ancient Greek Achaean League, the United Provinces of the Netherlands, and the American Articles of Confederation of 1781. The best modern example is the European Union.

A third species is *federacy*. This form involves an asymmetrical relationship between a federated state and a larger federate power. Federacy provides for a potential union in which the federated state maintains greater autonomy for self-government by forgoing certain forms of participation in the governance of the federate power. In the United States, this kind of arrangement is called "commonwealth." Both Puerto Rico and the Northern Marianas consented to federacy with the United States.

A fourth species is *associated statehood*. Here, the federated state is less bound to the federate power. Also, the compact that binds them usually allows the two units to break their ties under certain conditions. The United States has entered into associated statehood agreements with the federal states of Micronesia, Palau, and the Marshall Islands.

There are various quasi-federal arrangements too, including

- unions, such as the United Kingdom;
- leagues, such as the Association of Southeast Asian Nations (ASEAN);
- condominiums, such as the joint governance of Andorra for certain purposes by France and Spain;
- constitutional regionalization, as in Italy; and
- constitutional home rule, as in Japan.

Each form of federalism seeks to resolve a specific problem of governance in the world by combining a common government for the whole with sufficient self-government for the parts and/or by establishing a system of power-sharing to advance democratic self-government.

Beginning with the Russian Revolution of 1917, some totalitarian regimes established what they called "federalism." They tried to consolidate totalitarian rule by giving limited cultural autonomy to certain ethnic groups within specific constituent states. However, because federalism requires real power-sharing and democratic partnership, nondemocratic regimes cannot be honestly federal. Still, even where federalism was only window dressing, many ethnic constituent states could maintain some local strength.

Once their totalitarian regimes collapsed, the federal USSR, Czechoslovakia, and Yugoslavia each dissolved quickly. The ethnic groups asserted their sovereignty and sought to create independent states. Bloody conflict broke out in some places, such as Bosnia in the former Yugoslavia and Chechnya inside the new Russian Federation. New federal solutions will be needed to establish or maintain peace in several areas of the former Soviet Union.

While federal arrangements are embodied in constitutions and institutions, in the last analysis, federalism is about relationships. There must be a voluntary will to work together to achieve common objectives, even though the people in all their diversity and within their states and localities retain their own identities and still disagree on certain matters. This is not always easy to accomplish, but the price of failure can be bloodshed or suffocating uniformity imposed by a centralized regime.

Federal systems, therefore, must deal with important questions, such as:

1. the process of constitutional design and self-organization;
2. institutional structure, including the forms and structures of the constituent units and of the general government;
3. the sharing and division of powers, including tax and spending powers;
4. the establishment and maintenance of separate institutions for the general and constituent governments;
5. the particular combination of self-rule and shared rule that works well and the institutional structures that best support those processes; and
6. differences between symmetrical and asymmetrical federal arrangements.

Each federal arrangement achieves its own equilibrium in the division and sharing of powers. For example, in the English-speaking federal systems, separate institutions for each type of government usually carry out major constitutional functions. In contrast, in the German-speaking federal systems, extensive powers granted to the general government are normally modified by requiring constituent units to administer those powers.

This is one reason why it is difficult to transplant institutions or processes from one federal system to another. For example, Mexico adopted a federal constitution similar to that of the United States, but control of the federal government by one political party centralized power. Today, political reforms are reviving federal democracy in Mexico. Similarly, Nigeria adopted federal ideas from the British and American constitutional traditions, but military dictators have frustrated federal democracy. Federalism is under intense debate in South Africa, and many Americans are participating in the debate. Some form of federalism suitable to South Africa's

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Proposed Federal Gun-Control Amendment

Gayle Mertz and David Mertz

To the Teacher

This forum is a student-organized discussion of a legal issue. Your students are responsible for the forum. Your role is to provide copies of materials to the students and to serve as a consultant.

Forum planning should not begin until students are familiar with the articles by Douglas Kmiec on pages 4–6 and Erwin Chemerinsky on pages 7–8. They should also have completed the companion strategy by Frank Kopecky on pages 37–40. You might furnish them with other materials of your choice from this issue, as well as portions of the spring 1994 and spring 1995 issues of *Update on Law-Related Education*, which contain articles about gun-related crime.

The forum should take from two to five class periods, depending on the number of characters and amount of discussion. Independent research will elevate the quality of student presentations and overall scholarship. You, or your students, may elect to use all the sample characters, or you may revise or replace them. Make sure the characters represent diverse philosophical viewpoints.

To the Student

This forum will give you an opportunity to take responsibility for your own learning. It is similar to a town-hall meeting, where people come together to debate issues. The activity will help you explore other people's views and examine your own.

During this forum, you will consider the adoption of this mock proposed gun-control amendment to the U.S. Constitution.

Gun-Control Constitutional Amendment

Section 1. After one year from the ratification of this article, the possession, manufacture, sale, transportation, or use of firearms within, the importation thereof into, or the exportation thereof from the United States, the several states, and all territory subject to the jurisdiction thereof for any purpose is hereby subject to government regulation.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

Before the forum begins, please complete a ballot to identify your current attitudes about issues surrounding this amendment. There are no right or wrong answers.

How to Conduct the Forum

1. The class selects five students to serve on a forum panel.
2. All students complete the preforum ballot and submit it to the panel.
3. Students form groups to develop or adapt forum characters; 7–10 characters will be needed.
4. The class identifies community members to invite to participate in the forum. Community members may represent themselves or their organizations, role-play sample characters suggested here, create new characters, act as student coaches, or assist students in any aspect of the forum. Include your teacher in making plans to invite guest speakers.
5. The panel selects a facilitator and clerk from among student volunteers. It also organizes the class's selection of students to role-play sample and created characters.
6. The clerk schedules the presentations of all characters.
7. The panel conducts the forum.
8. All students complete a postforum ballot. The panel reviews, compares, summarizes, and reports the results to the class.
9. The class may debate and modify the proposed amendment.
10. The class votes on the revised amendment (or amendments), and the panel reports the results.

Getting Ready

The amendment proposed in this forum narrows the Tenth Amendment to the U.S. Constitution as it relates to firearms. To prepare for the forum, review the wording of the Tenth Amendment, and make sure you can distinguish it from the Second Amendment and the commerce clause of the Constitution (all discussed in materials furnished by your teacher).

Gayle Mertz develops and directs law-related education programs in Colorado and is a free-lance writer. Ms. Mertz is the 1995 recipient of the American Bar Association Isidore Starr Award for Excellence in Law-Related Education. David Mertz teaches and writes about social and political philosophy in western Massachusetts.

Review and add to the articles from current newspapers and magazines that you collected for the lesson about *U.S. v. Lopez*. Review literature, including recommended readings in the materials from your teacher, as well as other materials available from national, state, or local organizations that have positions on gun control. Also, talk to people in your community who are knowledgeable about the issues. Professionals you might ask to participate in the forum include local politicians, law-enforcement officials, Physicians for Social Responsibility, or members of the National Rifle Association or American Civil Liberties Union. Keep the forum focused on legal and political philosophy.

Student Roles

Panel

The panel organizes the forum. Members tally and review the results of the preforum and postforum ballots. The panel invites community members to participate in the forum upon recommendations from the class. It reviews and selects characters to be included and selects student volunteers to serve as clerk and facilitator. The panel provides a list of student and guest participants to the clerk. During the forum, panel members serve as members of the audience.

Clerk

The clerk receives a list of characters and guest speakers from panel members. The clerk schedules speakers for the forum and presents the schedule to the facilitator. During the forum, the clerk takes notes.

Facilitator

The facilitator opens the forum with a statement of purpose, such as "to explore whether the U.S. Constitution should be amended to allow federal regulation of noninterstate matters involving firearms." The facilitator calls on speakers to present their arguments in a five-minute period. She or he times the presentations and encourages the audience to ask questions and participate in a discussion of the issues. The facilitator closes the forum.

Audience

The audience (students who have not assumed roles as clerk, facilitator, or characters) participates by researching issues prior to the forum, listening during the testimony, and asking questions and discussing issues after the forum.

Characters

Characters have five minutes to testify about their experience, viewpoint, and recommendation. They are questioned by the audience and should answer consistently within their role.

Character 1 My name is Clara Williams. My ancestors arrived on the Mayflower. I love my country. I am a patriot and would do nothing to harm the United States. Yet, I know the founders of this great nation warned us about the evils of tyranny. They greatly distrusted strong centralized government, and so should we. The people's voice is stronger at the state and local level than at the federal level. That voice must prevail in issues that involve something as basic as our right to bear arms.

Now, more than ever, it is necessary for little people like us to defend our constitutional freedoms. The federal government has grown too powerful. I fear it may soon get out of control, enabling unscrupulous national officials to overrun us. This amendment will give federal officials the potential ability to take away our best means of self-defense—our guns. I urge all patriots to vote against this amendment. The framers of the Constitution would not have supported it. Instead, let's support an amendment that strengthens the Second Amendment, one that explicitly prohibits any federal regulation regarding the possession, manufacture, sale, use, or taxation of firearms. Please remember Thomas Jefferson's words. Jefferson said, "When people fear the government, you have tyranny. When the government fears the people, you have liberty."

Character 2 My name is Derritt Cornelius. I am a psychologist working in a federal prison. All the people I work with have been lawfully convicted of committing violent crimes. They are referred to me because they are psychologically unstable. They often deny their guilt and blame others, especially the "system," for their incarceration.

Unstable people may have difficulty sorting reality from rhetoric, and they can be driven to violence by unrealistic fear. Guns make murderous behavior possible. Fast-talking fanatics claiming federal conspiracy only cultivate fear of our government and its agencies. As the availability and sophistication of firearms accelerate, we are all put at greater risk of becoming victims of the psychologically unstable.

Recent events have shown that state and local governments and their agencies do not have the means to stem gun-related violence in our nation today. This amendment must be adopted so that the federal government may prohibit local ownership of automatic and any other firearms. We must be

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prepared to send in federal agents and enforce strong new federal gun laws.

Character 3 My name is Wallace Walks Alone. I want you to know that Indians, and other people of color, are more often victimized by weapons than are the white majority. We are more frequently victims of crime, and we have historically suffered abuses from the U.S. government.

Throughout its history, the U.S. government has invaded our land and murdered our people. Those of you who know about the federal military invasion at Wounded Knee on the Pine Ridge Reservation in 1973 know that the threat of federal mismanagement and abuse continues today. The potential for a federal conspiracy is not a myth.

Indians and other cultural identity groups need to know that we are secure from future federal mistreatment, including having the right to fight back with firearms if necessary. The U.S. government derives all its power from the people. It must never be given the ability to disarm them.

Character 4 My name is Rajan Maskay. I am a U.S. citizen who has recently resided in Japan for several years. As you may know, Japan's national government has strict gun-control laws. Other nations such as England and Canada have similar laws. The U.S. government, in fact, already has numerous gun laws. Unfortunately they are not the kind that can sufficiently protect people in these violent times.

When I was living in Japan, I felt much safer than I do now in the United States. Firearms in the hands and homes of citizens create danger for each of us. Strict federal gun regulation is the only meaningful deterrent.

I find it strange to hear people argue that federal gun regulation will risk government takeover. Surely you will agree that the governments of Japan, Canada, and England are not dictatorships. Yet each has an unarmed populace.

Times have changed since the Constitution and Bill of Rights were written. Every day we hear of senseless gun-related crime and injury perpetrated on the innocent, sometimes by armed children. We cannot deny that local gun control has become a legitimate concern of the federal government—which is charged with promoting the general welfare. How can anyone vote against this new amendment, which will give the government the ability to protect our troubled nation from itself?

Character 5 My name is Gilberto Hernandez. I represent the American Gun Owners Association. We are a diverse group of people from all walks of life. Many of us are hunters, and others are gun collectors. While some of our members live in areas that are very safe by national standards, a number are in dangerous areas and maintain firearms to protect themselves and their families from criminals. And, as with many organizations, we have members who are politically aware and fear the growing power of the federal government.

I want you to know that all our members are law abiding. And our position is that no government—federal, state, or local—has any reason to regulate our gun use in any way whatsoever. The Second Amendment clearly states that we have the right to bear arms. It is our personal choice when and how to exercise that right.

The accountability for gun-related crime that is not associated with interstate commerce is a state and local, not a federal, concern. If some areas of the nation are overridden with crime, then let their states and municipalities deal with it, including passing tax laws that will provide the money they need to beef up law enforcement. There is no reason for the entire nation to pay for a federal apparatus to clean up crime that exists only because state and local government officials have failed to protect the people who put them in office. Vote them out.

Character 6 My name is Matthew Lewis. Like many people here today, I too consider myself a patriot. I firmly believe in supporting our Constitution, and know that it has served us well for over 200 years. But times change, and the Constitution must change with them. In fact, it started changing the moment it was written and submitted to the states for ratification in 1787.

Then, many people wanted a bill of rights, including what became the Second Amendment. Three delegates to the Constitutional Convention—Elbridge Gerry, George Mason, and Edmund Randolph—refused to sign the Constitution because it lacked a bill of rights. Patrick Henry spoke out vehemently against the Constitution. North Carolina and Rhode Island actually refused to ratify and take part in the new government until Congress agreed to add one. Several powerful states, including Virginia, New York, and Massachusetts, resisted ratification for the same reason, but finally did sign when they understood that a bill of rights would be added.

Today, many people are beginning to discuss the implications of the Second Amendment. But today, they want and obviously need protection from those who would abuse the freedom it provides. People are vigorously voicing their opinions about this issue, and sending people to Washington to find a solution. The people are speaking, and many want to broaden federal regulation of guns beyond cases that involve interstate commerce.

In the face of the runaway crime in our nation, who can logically defend the outworn wisdom of 200 years past, which came from people whose weapons consisted of muskets, sabers, knives, and cannonballs? The newly proposed amendment will bring into the 21st Century the outdated Second Amendment.

Forum Ballot

Circle the choice that best reflects how you feel about the issue. If you do not understand the statement, or have an opinion, go to the next statement.

I believe that government should be able to	strongly agree				strongly disagree
1. Require gun owners to take gun-safety classes.	1	2	3	4	5
2. Restrict gun ownership to the emotionally stable.	1	2	3	4	5
3. Require those who manufacture and sell guns to comply with safety regulations.	1	2	3	4	5
4. Regulate the importation of guns from other nations.	1	2	3	4	5
5. Regulate the exportation of guns to other nations.	1	2	3	4	5
6. Regulate the sale and transportation of firearms between states.	1	2	3	4	5
7. Prohibit gun possession by convicted criminals.	1	2	3	4	5
8. Prohibit gun possession by minors.	1	2	3	4	5
9. Prohibit gun possession without a clear showing of strong personal need, for example, for hunting for food or self-defense.	1	2	3	4	5
10. Prohibit ordering guns, or parts of guns, by mail.	1	2	3	4	5
11. Prohibit pistol ranges within defined jurisdictions.	1	2	3	4	5
12. Prohibit the ownership and sale of all automatic and assault-type firearms.	1	2	3	4	5

In the chart below, check which government—federal, state, and/or local—you feel must have jurisdiction in the regulatory areas above in order for the people to be safe from gun-related crimes. There may be more than one check per row.

	Federal	State	Local
1. Require gun owners to take gun-safety classes.			
2. Restrict gun ownership to the emotionally stable.			
3. Require those who manufacture and sell guns to comply with safety regulations.			
4. Regulate the importation of guns from other nations.			
5. Regulate the exportation of guns to other nations.			
6. Regulate the sale and transportation of firearms between states.			
7. Prohibit gun possession by convicted criminals.			
8. Prohibit gun possession by minors.			
9. Prohibit gun possession without a clear showing of strong personal need, for example, for hunting for food or self-defense.			
10. Prohibit ordering guns, or parts of guns, by mail.			
11. Prohibit pistol ranges within defined jurisdictions.			
12. Prohibit the ownership and sale of all automatic and assault-type firearms.			

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9. Use the following as a guide to summarize the lesson:

a. Have you determined which party each group represents?

b. Were any of you in Group 1 or 2 having difficulty arguing your position? Explain.

c. Is federalism a dilemma/conundrum? Explain.

Use the following comments to bring closure to the lesson: Over time, political parties have formed, and conflicts have flared between the states and the "feds" over what each should be doing and paying for. Most responsibilities of government, now, are shared by the states and the federal government with the cooperation of local governments. One government may have priority or "the final say" in certain specific matters, but all of our governments are more or less involved in almost every facet of domestic and foreign affairs. They share power in order to serve "*We the People. . . .*"

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Amendment has been interpreted in recent times not as a limitation upon Congress, but as a recognition of the right of the states to make laws when not preempted by congressional activity. Over the last 30 years, Congress has entered many criminal law areas with little or no concern about possible Tenth Amendment violations.

There were times in our constitutional history when the Supreme Court treated the Tenth Amendment differently. Up until the 1930s, the Court ruled that there were some definite areas that were reserved to the states with which Congress could not interfere. Some constitutional scholars and political leaders advocate a return to this position. The Supreme Court in *Lopez* may have given these advocates encouragement. However, the Sup-reme Court ruled primarily that Congress exceeded its powers under the commerce clause. It did not conclude that Congress had breached limits found in the Tenth Amendment.

Second Amendment

Although the *Lopez* case involved the regulation of firearms by Congress, the Supreme Court did not base its decision upon the Second Amendment. The Second Amendment of the Constitution reads:

> *A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed.*

Courts have generally ruled that laws regulating weapon use are not prohibited by the Second Amendment. All states have laws regulating gun usage.

Since 1934, Congress has passed laws regulating the sale and manufacture of weapons under its power to regulate commerce. These laws prescribe criminal penalties for violations. Congress has also passed laws creating federal offenses for crimes that involved interstate activities and travel over state lines. Penalties exist for using weapons in these federal offenses.

Federalism

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unique circumstances may be needed to hold that country together and maintain its new democracy.

In summary, human relationships, shared rule and self-rule, diversity in unity, balanced powers, cooperation, and partnership are among the key elements of federalism. These are also key ingredients for the coexistence of diverse peoples in a world of peace, prosperity, and liberty. ◆

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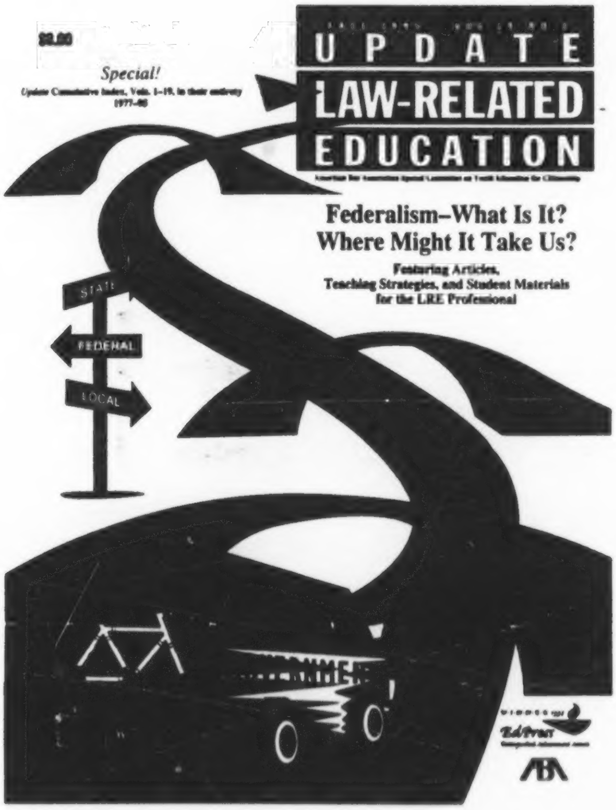

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